86-6109

DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

FREDERICK MATHEWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Should this court resolve a conflict in the circuits as to whether a criminal defendant may use the entrapment defense when he admits committing all of the acts constituting the offense but denies possessing the requisite criminal intent?

II. Does the Seventh Circuit's interpretation of Batson v. Kentucky impermissibly allow prosecutors far more leeway in making jury selections than this Court intended?

LIST OF PARTIES BELOW

The petitioner, Frederick Mathews, and the United States of America were the parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	1
LIST OF PARTIES BELOW	1
TABLE OF AUTHORITIES	ii
OPINION BELOW	1
JURISDICTIONAL GROUNDS	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING WRIT	6
I. THE SEVENTH CIRCUIT'S REQUIREMENT THAT A DEFENDANT SEEKING TO USE THE ENTRAPMENT DEFENSE MUST ADMIT THE CRIMINAL INTENT AS WELL AS THE ACTS CONSTITUTING THE OFFENSE CHARGED IS IN DIRECT CONFLICT WITH THE SUPREME COURT'S DECISIONS AND THE DECISIONS OF AT LEAST SEVEN OF THE OTHER CIRCUITS	6
II. THE SEVENTH CIRCUIT'S INTERPRETATION OF BATSON V. KENTUCKY ERRONEOUSLY PERMITS PROSECUTORS MORE BIAS IN VENIRE DECISIONS THAN THIS COURT'S DECISION ALLOWS	15
CONCLUSION	17
APPENDIX	
Decision Below: United States v. Mathews, 803 F.2d 325 (7th Cir. 1986)	101
Order Denying Petition for Rehearing and Suggestion for Rehearing en banc	109

TABLE OF AUTHORITIES

Cases	Page
Batson v. Kentucky, 106 S. Ct. 1712 (1986)	15
Crisp v. United States, 262 F.2d 68 (4th Cir. 1958)	9, 12, 13
Hampton v. United States, 425 U.S. 484 (1976)	6, 13
Sherman v. United States, 356 U.S. 369 (1958)	6, 13, 14
Sorrells v. United States, 287 U.S. 435 (1932)	6, 9, 10, 13

United States v. Caron, 588 F.2d 851 (1st Cir. 1978)..... 11, 13

United States v. Demma, 523 F.2d 981 (9th Cir. 1975)..... 9, 10, 12, 13

United States v. Henry, 749 F.2d 203 (5th Cir. 1984) (en banc)..... 10, 13

United States v. Janotti, 673 F.2d 578 (3d Cir.), cert. denied, 457 U.S. 1106 (1982)..... 12

United States v. Johnston, 426 F.2d 112 (7th Cir. 1970).. 7

United States v. Kelly, 748 F.2d 691 (D.C. Cir. 1984).... 10, 13

United States v. Liparota, 735 F.2d 1044 (7th Cir. 1984). 7

United States v. Mathews, 803 F.2d 325 (7th Cir. 1986)... 1, 9, 15

United States v. Mayo, 705 F.2d 62 (2d Cir. 1983)..... 12

United States v. Mitchell, 514 F.2d 758 (6th Cir.), cert. denied, 423 U.S. 847 (1975)..... 12

United States v. Mora, 768 F.2d 1197 (10th Cir. 1985), cert. denied, 106 S. Ct. 856 (1986)..... 12

United States v. Nicosia, 638 F.2d 970 (7th Cir. 1980)... 9, 10

United States v. Rodgers, 755 F.2d 533 (7th Cir. 1985)... 7, 9

United States v. Russell, 411 U.S. 423 (1973)..... 6, 13

United States v. Smith, 757 F.2d 1161 (11th Cir. 1985)... 11

United States v. Valencia, 646 F.2d 1158 (2d Cir. 1980).. 9, 12, 13

United States v. Walker, 720 F.2d 1527 (11th Cir. 1983), cert. denied, 465 U.S. 1108 (1984)..... 11, 13

Statutes

18 U.S.C. § 201(g)..... 1, 5

18 U.S.C. § 3231..... 5

28 U.S.C. § 1254(1)..... 1

28 U.S.C. § 1291..... 11, 13

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PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE SEVENTH CIRCUIT

The petitioner, Frederick Mathews, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on October 9, 1986.

OPINION BELOW

The opinion below is United States v. Mathews, which is reported at 803 F.2d 325 (7th Cir. 1986), and is reproduced in the Appendix to this Petition.

JURISDICTIONAL GROUNDS

The decision sought to be reviewed was decided on October 9, 1986. The order denying the Petition for Rehearing and Suggestion for Rehearing En Banc was entered October 29, 1986. This Court has jurisdiction to review the decision below pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Petitioner was convicted of violating 18 U.S.C. § 201(g), which provides as follows:

> Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; .
>
> . . . .
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

The Small Business Administration ("SBA") is an agency of the United States. Its purpose is to assist small businesses with financing, business advice, and helping to obtain government contracts.

Petitioner Frederick Mathews, who is black, was employed in the Milwaukee SBA office as a Business Development Specialist. His job was to facilitate the 8A Program, which is designed to encourage small businesses owned by socially and economically disadvantaged small business concerns.

Midwest Knitting Mills, Inc. was, at all times material to this case, a qualified small business eligible for participation in the 8A Program. James DeShazer was its owner and operator. At some time prior to November or December of 1984, Midwest Knitting Mills arranged with the SBA to receive advance payments to enable it to perform on various contracts.

Prior to 1979, DeShazer knew Mathews on a social basis. DeShazer and Mathews had lunches and evening drinks together, played the lottery together, and shared discussions of personal and family matters. In fact, Mathews was a quiet man, a loner

who kept to himself and considered DeShazer a friend as well as a business acquaintenance, particularly in light of the confidences they shared. DeShazer also considered Mathews a personal friend. At one point in 1984 Mathews asked for and received from DeShazer a loan in the amount of $1,500.00 to assist in paying his daughter's college expenses.

In November of 1984, Mathews was relieved of full responsibility for the Midwest Knitting Mills file. At the same time, in November or December of 1984, Midwest Knitting Mills began having problems getting its advance payments through the SBA to facilitate its purchase of raw materials to perform its government contracts.

During that time, DeShazer also started "getting a lot of heat" from the Navy's purchasing agent about fulfillment on the contracts. He told the agent that he suspected that Mathews was not processing the documents, and said that Mathews kept asking him for money.

In approximately January of 1985, the FBI contacted DeShazer regarding his allegations that Mathews was soliciting loans from him, and asked DeShazer to assist in an investigation of Mathews. DeShazer agreed to tape-record conversations with Mathews if the FBI would supply him with equipment.

On or about February 22, 1985, Mathews was informed by his superior at the SBA that his employment would be terminated within the next month or so. Mathews told DeShazer and other clients about his impending termination.

In late February of 1985, DeShazer and Mathews met at a restaurant. Although DeShazer denied knowing that Mathews was being terminated, DeShazer told Mathews that he had arranged a loan of approximately $12,000.00, that he had the money in cash in his garage, that he needed only $7,000.00 of it, that he did

not want his wife to find out about the extra cash, and that he would loan $4,200.00 to Mathews. Mathews was interested in the loan because he was financially strapped due to his impending termination, his separation from his wife, and the resultant increased living expenses.

Over the next several weeks, the subject of that loan came up in conversations between DeShazer and Mathews on several occasions. Ultimately, Mathews decided to accept the loan as a personal loan if DeShazer was sincere about offering it.

On April 8, 1985, DeShazer called Mathews and asked Mathews to meet him after work. DeShazer gave Mathews a ride to the service station that was repairing Mathews' car, and on the way there DeShazer again offered to loan the money to Mathews. DeShazer next arranged a meeting during which he would give the loan money to Mathews; however, Mathews did not keep that appointment. In a telephone conversation on April 22, 1985, the night before their final meeting, DeShazer asked Mathews if he was still interested in the loan and suggested that Mathews might not get any of it because DeShazer might spend it himself.

Finally, on April 23, 1985, DeShazer again called Mathews and asked Mathews to meet him at a hotel in Milwaukee to pick up a repayment schedule with the I.R.S., an important document for DeShazer's SBA matters. During this and some of the other conversations between the two men in the preceding weeks, DeShazer continued to ask about the processing of his advance payment documents at the SBA. Mathews explained, as he had previously, that everything was in order and had been processed. Because DeShazer seemed upset, Mathews "let him rant and rave on," although he was in a hurry and thinking of other matters. DeShazer then said he had the loan money there, and Mathews accepted it. Mathews said they could leave the

restaurant together, but DeShazer said they should leave separately. Mathews was arrested as he left the hotel.

Mathews was charged with receipt of money as an employee of the SBA, in violation of 18 U.S.C. § 201(g). The United States District Court for the Eastern District of Wisconsin had original jurisdiction pursuant to 18 U.S.C. § 3231.

At trial, defense counsel moved for a mistrial on the ground that the government exercised its peremptory strikes to remove from the jury panel all three of the blacks on the panel. The defendant was black, as was the government's main witness. The government stated on the record the reason each black venireperson was peremptorily excused:

> (1) Mrs. Switzer had reservations about the use of tape recorded evidence.
>
> (2) Ms. Phenix arrived late to court, which the government interpreted as a lack of commitment to the proceedings.
>
> (3) Mr. Robinson seemed hostile to the government attorney.

Ms. Phenix was not the only person who was late returning to court, and a white woman who was also late was kept on the jury. In addition, Janice Kluz, a white woman, also expressed reservations about tape-recorded conversations, but was kept on the jury. The trial court found the government's reasons rational, and though the judge admitted he had noticed nothing unusual about Mr. Robinson, he added information regarding Ms. Phenix's posture. He also found that because the principal witness on each side was black, the presence or absence of a black juror would not appear to have any significant impact upon the jury. Finally, the court noted no pattern of the United States Attorney's Office for the Eastern District of Wisconsin excluding blacks from juries. Accordingly, the trial court denied the motion for mistrial.

Following the entry of judgment on October 18, 1985, Mathews filed a timely notice of appeal. The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S REQUIREMENT THAT A DEFENDANT SEEKING TO USE THE ENTRAPMENT DEFENSE MUST ADMIT THE CRIMINAL INTENT AS WELL AS THE ACTS CONSTITUTING THE OFFENSE CHARGED IS IN DIRECT CONFLICT WITH THE SUPREME COURT'S DECISIONS AND THE DECISIONS OF AT LEAST SEVEN OF THE OTHER CIRCUITS.

The entrapment defense is premised upon "the notion that Congress could not have intended criminal punishment for a defendant who has committed all of the elements of a proscribed offense, but was induced to commit them by the Government." United States v. Russell, 411 U.S. 423, 435 (1973). Mathews admitted committing the acts constituting the offense charged, but denied possessing the requisite criminal intent. His position as to entrapment was and is that the evidence regarding scienter is the result of entrapment by the Government.

This Court's decisions over the past fifty-four years have held that the entrapment defense "'focus[es] on the intent or predisposition of the defendant to commit the crime' . . . . rather than upon the conduct of the Government's agents," and that "'[i]t is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.'" Hampton v. United States, 425 U.S. 484, 488-89 (1976)(quoting United States v. Russell, 411 U.S. 423 (1973)). See also Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435, 442 (1932).

In the district court, Mathews filed a motion in limine seeking permission to present evidence and have the jury receive instructions on the entrapment defense as well as on the defense of lack of criminal intent. That motion was made necessary by the general rule in the Seventh Circuit which prohibits a defendant from pleading entrapment if he denies the act charged. E.g., United States v. Rodgers, 755 F.2d 533, 550 (7th Cir. 1985); United States v. Johnston, 426 F.2d 112, 114 (7th Cir. 1970). That rule, however, has recently received substantial criticism in the Seventh Circuit, as will be discussed below.

The Seventh Circuit requires the defendant to admit the acts constituting the offense with which he is charged, but is not clear as to whether an admission of the acts but a denial of the criminal intent gives rise to a situation in which the entrapment defense may appropriately be given. In United States v. Johnston, the Seventh Circuit held that "absent admission of the act an instruction on entrapment will not be submitted to the jury." Id., 426 F.2d at 114 (emphasis added). More recently, the Seventh Circuit held that "it is clear in this circuit that a defendant must admit the alleged acts which constitute the crime with which he is charged in order to raise an entrapment defense." United States v. Liparota, 735 F.2d 1044, 1048 (7th Cir. 1984) (emphasis added). That rule was reiterated in the Seventh Circuit's most recent ruling on the issue in United States v. Rodgers, 755 F.2d 533, 550 (7th Cir. 1985), where the Seventh Circuit noted the general rule prohibiting a defendant from pleading entrapment while simultaneously denying the act charged.

The trial court in the instant case denied the motion in limine on the ground that in order to utilize the entrapment

defense, "the defendant must concede that what he did was wrong, and that he was encouraged to do that by virtue of the acts of the Government or Government witnesses, or other individuals acting for or on behalf of the Government." (R. 37:89). Because the defendant here denied that he "did in fact engage in the conduct that he has been accused of," the court held that the entrapment defense was not available to him. (R. 37:89).

The trial court's summary of defendant's position was not entirely accurate. This was not a case where the defendant denied accepting any money from DeShazer. Mathews admitted accepting the money, but said that he was entrapped into doing so. As noted earlier, he admitted all of the acts constituting the offense, but denied having the mens rea necessary to convert otherwise innocent conduct into a criminal offense.

The jury therefore could have consistently found that Mathews accepted the payment, but that even though he accepted the payment he never possessed the requisite criminal intent to convert his acceptance of the loan to acceptance of a bribe. On the other hand, the jury could have found that the circumstantial evidence proved that Mathews did in fact possess the requisite criminal intent at the time he accepted the loan, but that he was not ready and willing to enter into that type of transaction without the inducements and urgings of DeShazer, and thus Mathews would be entitled to the entrapment defense. Denying Mathews the use of the entrapment defense in such circumstances effectively precluded him from using an entire theory of defense which was wholly consistent with his admission of the acts involved but denial of the criminal intent.

On appeal, the Seventh Circuit emphasized and clarified its rule that a defendant who pleads entrapment must admit that he had criminal intent, but then assert that the government implanted the criminal design in his mind. The Seventh Circuit found that position "inconsistent per se with the defense that the defendant never had the requisite criminal intent." United States v. Mathews, 803 F.2d 325, 327 (7th Cir. 1986)(App. 103). Although Mathews has never claimed that he had any criminal intent, the Seventh Circuit's approach clearly allows use of the entrapment defense only when the defendant admits having criminal intent and doing all of the acts, but claims that he would not have had the criminal intent had not the government implanted that intent in this mind.

The Seventh Circuit's current position directly conflicts with the Supreme Court's view that there is no inconsistency in joining an entrapment plea with a not guilty plea. Sorrells, 287 U.S. at 452. Following that reasoning, the Ninth and Fourth circuits allow a defendant to deny all elements of a charge. United States v. Demma, 523 F.2d 981 (9th Cir. 1975); Crisp v. United States, 262 F.2d 68 (4th Cir. 1958). The Second Circuit also allows a plea of entrapment if a defendant does not admit the offense charged, so long as the defendant does not actually deny it. United States v. Valencia, 646 F.2d 1158 (2d Cir. 1980).

As noted earlier, the Seventh Circuit has been tempted on prior occasions to reconsider its rule that the defendant may not deny the offense and plead entrapment. Rodgers, 755 F.2d at 550; United States v. Nicosia, 638 F.2d 970, 972-73 (7th Cir. 1980). In fact, in Nicosia, Judge Swygert argued strongly and persuasively that the rule is no longer valid in the Seventh Circuit and is illogical where scienter is the issue in

a particular case. Nicosia, 638 F.2d at 976-79 (Swygert, J., dissenting).

Under the Supreme Court's decisions from Sorrell to Hampton, the key question when determining whether a defendant is entitled to use the entrapment defense is, where did the criminal intent originate? If it originated with the defendant -- in other words, if the defendant was predisposed to commit the criminal act -- the defendant is not entitled to use the entrapment defense. On the other hand, if the defendant was not predisposed, and the intent originated with and was induced in the defendant by the government, entrapment is a valid defense. E.g., Sorrells, 287 U.S. at 442. "The requirement that the defendant concede a state of mind is in direct conflict with the Sorrells conception of entrapment." Demma, 523 F.2d at 983.

The circuits are sharply divided on whether a defendant can claim entrapment while denying scienter. Several circuits allow the entrapment defense where, as in the instant case, the defendant admits committing the acts charged but denies possessing the requisite mens rea. For example, in United States v. Kelly, 748 F.2d 691 (D.C. Cir. 1984), an ABSCAM case, the District of Columbia Circuit held that the entrapment instruction was properly given where the defendant admitted he took a bribe, but claimed he did so to further an investigation and therefore lacked the necessary criminal intent.

The Fifth Circuit Court of Appeals, sitting en banc, recently clarified a long line of conflicting prior cases in that circuit when it held that if a defendant admits the acts charged but presents evidence negating his criminal intent, he is entitled to an entrapment instruction. United States v. Henry, 749 F.2d 203, 205-06 (5th Cir. 1984)(en banc). The

Fifth Circuit took the approach that the accused is not guilty if he was not predisposed to commit the crime, rather than the approach that he is guilty of the crime but can avoid punishment because the government entrapped him. Id. at 209. In so doing, the Fifth Circuit aligned itself with the United States Supreme Court's long line of cases cited earlier.

Similarly, the First Circuit held that a defendant was entitled to receive the entrapment instruction where he admitted facts sufficient to convict him of the offenses charged, but denied criminal intent in performing the acts in question. In United States v. Caron, 588 F.2d 851 (1st Cir. 1978), the First Circuit

> found no inconsistency between trying to convince the jury that the acts alleged did not add up to the crime charged and trying to convince the jury that one was entrapped into such innocent acts. A defendant can claim that he was induced by the government to perform acts which were, after all, innocent and which he contends did not constitute a violation of law of the sort for which he was induced.

Id. at 853 (emphasis in original).

The Eleventh Circuit Court of Appeals prohibits use of the entrapment defense if it conflicts with another defense theory, with certain exceptions. An entrapment defense is allowed in conjunction with a not guilty plea as long as the defenses are not so inconsistent as to confuse the jury. United States v. Walker, 720 F.2d 1527, 1534 (11th Cir. 1983), cert. denied, 465 U.S. 1108 (1984). As long as such seemingly inconsistent defenses are not "impermissibly inconsistent" -- that is, they do not disprove each other -- they are allowed. United States v. Smith, 757 F.2d 1161, 1168 (11th Cir. 1985). The Smith court cited the Fifth Circuit's cases, thereby indicating some inclination toward that circuit's position allowing use of the entrapment defense if the defendant admits the acts but denies the intent.

The Second Circuit's position seemed to be clearly established in United States v. Valencia, 646 F.2d 1158 (2d Cir. 1980), where that court held that the entrapment defense was available to a defendant who did not admit the allegedly criminal acts as long as he did not actually deny them. In United States v. Mayo, 705 F.2d 62 (2d Cir. 1983), however, that court, referring to the Fifth Circuit's position, specifically reserved ruling on how it would decide if the defendant "had not denied the acts alleged in the indictment, but instead had admitted the acts and offered an explanation of his conduct that was consistent with his theory of entrapment." 705 F.2d at 73.

At the far ends of the spectrum are those circuits which require the defendant to admit every element of the offense charged, including mens rea, before the entrapment defense is available, and those circuits which allow the defendant to claim totally inconsistent defense. The former group includes the Third Circuit, United States v. Janotti, 673 F.2d 578 (3d Cir.), cert. denied, 457 U.S. 1106 (1982); the Sixth Circuit, United States v. Mitchell, 514 F.2d 758 (6th Cir.), cert. denied, 423 U.S. 847 (1975); and the Tenth Circuit, United States v. Mora, 768 F.2d 1197 (10th Cir. 1985), cert. denied, 106 S. Ct. 856 (1986). The Mora court expressly referred to the division in the circuits, and attempted to briefly categorize the circuits' various positions. 768 F.2d at 1198 n.1.

The latter group comprises the opposite extreme, consisting of those circuits which permit totally inconsistent defenses and allow the defendant to assert entrapment without conceding that he committed the crime or any of its elements. United States v. Demma, 523 F.2d 981 (9th Cir. 1975); Crisp v. United States, 262 F.2d 68 (4th Cir. 1958). The Ninth Circuit

concluded that a defendant's denial of the acts constituting the offense, while asserting entrapment, simply raises a credibility issue for the jury. Demma, 523 F.2d at 985.

The above discussion demonstrates that the Seventh Circuit's requirement that a defendant seeking to use the entrapment defense admit all elements of the offense charged, including intent, is contrary to a line of Supreme Court cases dating back fifty-four years. Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). It is also in direct conflict with at least seven of the other circuit courts of appeals. United States v. Henry, 749 F.2d 203 (5th Cir. 1984); United States v. Kelly, 748 F.2d 691 (D.C. Cir. 1984); United States v. Walker, 720 F.2d 1527 (11th Cir. 1983), cert. denied, 465 U.S. 1108 (1984); United States v. Valencia, 646 F.2d 1158 (2d Cir. 1980); United States v. Caron, 588 F.2d 851 (1st Cir. 1978); United States v. Demma, 523 F.2d 981 (9th Cir. 1975); Crisp v. United States, 262 F.2d 68 (4th Cir. 1958).

The Seventh Circuit's general rule is not easily applied in the instant case. Mathews acknowledged receiving money and performing all acts necessary to establish that the offense occurred. Under the general rule, therefore, the trial court should have allowed Mathews to claim entrapment, because he met the necessary prerequisite of the Seventh Circuit's present rule. The only factor Mathews denied was the criminal intent to receive the money as a gratuity in relation to his employment at the SBA. He at all times considered the money a personal loan from a friend, as had occurred between them in the past.

The facts provide a more than sufficient basis on which the jury could conclude that Mathews was not predisposed to solicit and receive money. His character was never in question. He had no prior convictions. The government, through DeShazer, suggested the loan to Mathews, at a time when Mathews was especially vulnerable due to his impending termination and increased financial pressures. Mathews did not solicit that loan. Had the jury been allowed to consider the entrapment defense, it very well could have found that Mathews was not predisposed to commit the offense, and that he would not have done so had not DeShazer, on behalf of the government, persisted.

In 1958, Chief Justice Warren wrote that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." Sherman, 356 U.S. at 372. Mathews was not a criminal who insisted that DeShazer loan or give him money to further his SBA affairs. Nothing in the evidence suggests that. On the contrary, Mathews was the unwary innocent who, perhaps, naively, believed that his "friend" conveniently took out an extra-large loan just when Mathews was desperate for extra money, and insisted that Mathews share his bounty. Mathews' denial of intent thus was entirely consistent with his claim of entrapment. He should not be precluded from using that defense because the Seventh Circuit continues to interpret the entrapment defense in a manner wholly contradictory to the decisions of this Court and seven other circuits.

Where, as here, the defendant freely admitted all acts, but denied having the criminal intent, his evident lack of predisposition to enter into the loan arrangement may well have been sufficient for the jury to acquit Mathews on the basis that he

was entrapped. Accordingly, the entrapment instruction should have been given. In another circuit, such as the District of Columbia Circuit, the First Circuit, the Fifth Circuit, and possibly the Second Circuit or the Eleventh Circuit, the instruction would have been given.

II. THE SEVENTH CIRCUIT'S INTERPRETATION OF BATSON V. KENTUCKY ERRONEOUSLY PERMITS PROSECUTORS MORE BIAS IN VENIRE DECISIONS THAN THIS COURT'S DECISION ALLOWS.

The Seventh Circuit correctly summarized the holdings of Batson v. Kentucky, 106 S. Ct. 1712 (1986), as requiring the defendant to make a prima facie showing of discrimination in selection of the jury panel, at which point the burden shifts to the prosecutor to present a neutral explanation for the challenges to black jurors. Mathews, 803 F.2d at 329-30. The Seventh Circuit carefully noted, yet seemingly overlooked, the Batson caution against allowing the prosecutor to rebut the prima facie case by merely denying a discriminatory motive or claiming good faith. Mathews, 803 F.2d at 330.

Yet it was just such an explanation the prosecutor provided regarding the last strike, Mr. Declinton Robinson. The prosecutor claimed she sensed hostility from Mr. Robinson, and the district court accepted her explanation, while commenting that he noticed no such problem. Of course, the trial court did not have the benefit of Justice Marshall's reminder that "[a] prosecutor's own conscious or unconscious racism may lead him [or her] easily to the conclusion that a prospective black juror is 'sullen' or 'distant' . . . ." or in this case, hostile. Batson, 106 S. Ct. at ____ (Marshall, Jr., concurring).

Similarly, the strikes against the other two blacks, Mrs. Switzer and Ms. Phenix, were premised upon reasons that applied

equally strongly to two white women who were kept on the jury. Was it mere coincidence that, given the concerns in question, the black women were stricken and the white women were not? Or did the "facially neutral reasons" conceal a conscious or unconscious discriminatory intent to remove the blacks from the panel? Legitimate, facially neutral reasons lose their credibility as bases for striking veniremembers when those reasons apply equally strongly to whites, who are left on the jury.

No explanation was requested by the trial court or provided by the prosecutor as to the blatantly disparate treatment of identical concerns about black jurors and white jurors. The district court seemed to be impressed by the amount of time the prosecutor used to make her strike decisions. If that is to be a factor in weighing the credibility of the government's rebuttal to the defendant's prima facie case, the prosecution in any case need only take care to spend a great deal of time on the jury selection process to add weight to its claim of good faith.

The prosecutor may not even have been aware of her motives in striking all of the black jurors, but her reasons for making her selections cannot withstand even the most cursory scrutiny. Her reasons in two cases applied equally strongly to white veniremembers, yet she struck the blacks. Her reason in the third case was wholly subjective, based upon an "attitude" which the trial judge never noticed.

The intent of Batson is to prevent prosecutors from striking members of minority racial groups from venire panels based upon their race. Prosecutors cannot be allowed to escape that prohibition by claiming, without more, wholly subjective bases or bases that apply equally well to while veniremembers. Prosecutors who do wish to deliberately exclude minorities could easily justify their conduct on those grounds.

CONCLUSION

For all the foregoing reasons the Court is respectfully urged to grant this Petition for a Writ of Certiorari to issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Frederick MATHEWS,
Defendant-Appellant.

No. 85-2904.

United States Court of Appeals,
Seventh Circuit.

Argued June 12, 1986.
Decided Oct. 9, 1986.

Defendant was convicted in the United States District Court for the Eastern District of Wisconsin, Thomas J. Curran, J., of accepting thing of value as public official for official act to be performed by him, and he appealed. The Court of Appeals, Bauer, Chief Judge, held that: (1) defendant was required to admit all elements of crime with which he was charged, including intent, before he could plead entrapment; (2) exclusion of veniremen who expressed misgivings about covert tape recordings was proper; and (3) prosecutor gave sufficient explanation for its use of peremptory strikes to exclude all blacks from jury.

Affirmed.

1. Criminal Law ⇐37(1)

Defendant must admit all elements of crime with which he is charged, including intent, before he may plead entrapment; declining to follow *United States v. Caron*, 588 F.2d 851 (1st Cir.); *United States v. Henry*, 749 F.2d 203 (5th Cir.); *United States v. Kelly*, 748 F.2d 691 (D.C.Cir.); *United States v. Demma*, 523 F.2d 981 (9th Cir.); *Crisp v. United States*, 262 F.2d 68 (4th Cir.).

2. Jury ⇐33(2)

Exclusion for cause of several veniremen who expressed misgivings about covert tape recordings did not deny bribery defendant constitutional right to impartial jury representing cross section of community. U.S.C.A. Const.Amend. 6.

3. Jury ⇐121

Finding that Government did not intentionally discriminate when exercising its peremptory challenges to remove all blacks from jury was sufficiently supported by prosecutor's explanation for removal of each individual juror, fact that key witnesses for both sides were black, thus discounting any advantage a discriminating prosecutor might perceive in striking blacks from jury, and lack of evidence prosecutor had maintained pattern or practice of striking blacks from juries in cases where defendants were black.

Jeffrey A. Kaufman, Gimbel Gimbel & Reilly, Milwaukee, Wis., for defendant-appellant.

Jan E. Kearney, Asst. U.S. Atty., Milwaukee, Wis., for plaintiff-appellee.

Before BAUER, Chief Judge, and COFFEY and RIPPLE, Circuit Judges.

BAUER, Chief Judge.

The defendant, Frederick Mathews, was convicted of receiving money as an official of the Small Business Administration in violation of 18 U.S.C. § 201(g). He appeals, alleging three grounds for reversal: that the district court erred by refusing to allow Mathews to claim entrapment unless Mathews admitted all elements of the crime, including the element of intent; that the district court erred in excluding for cause several veniremen who expressed disapproval of tape recording conversations without the knowledge of all parties; and that the district court erred in denying Mathews' motion for a mistrial based on the prosecution's use of peremptory strikes to remove all black veniremen from the jury. We find the district court committed no error and affirm its judgment of conviction.

I.

Mathews was employed in the Milwaukee office of the Small Business Administration ("SBA") as a Business Development Specialist in charge of the "8A Program." The 8A Program is designed to aid small businesses owned by socially and economically disadvantaged concerns. Applicants for the 8A Program become clients of the SBA. With the SBA serving as primary contractor and the 8A client acting as subcontractor, the SBA attempts to procure government contracts on behalf of 8A clients and to help them perform on the contract.

The charge of which Mathews was convicted concerns Mathews' relationship with James DeShazer. DeShazer is the president and owner of Midwest Knitting Mills. Midwest Knitting Mills was a participant in the 8A Program and obtained several contracts through the SBA. Mathews was DeShazer's main contact at the SBA.

The evidence at trial showed that Mathews accepted loans from DeShazer (Mathews says two, the government says more). Mathews claims the loans, including the loan involved in this case, were personal loans from DeShazer unrelated to Mathews' duties at the SBA. The government and DeShazer claim the loans were gratuities required by Mathews to obtain his cooperation in SBA matters.

In support of its theory, the government introduced evidence that included tape recordings of conversations between Mathews and DeShazer discussing the loan that resulted in Mathews' arrest and prosecution. These conversations had been covertly taped by DeShazer under the direction of the FBI which began investigating Mathews in response to a complaint by DeShazer to a Navy purchasing agent regarding Mathews' repeated requests for loans.

The jury believed the government's version of the facts and convicted Mathews of the charge of accepting a thing of value as a public official for an official act to be performed by him, a violation of 18 U.S.C. § 201(g). The trial judge entered judgment accordingly and sentenced Mathews to three years probation, the first two years to be served under house arrest. Mathews appeals.

II.

Mathews claims the trial court erred in denying his motion *in limine* to present evidence on the defense of entrapment. Mathews asks us to reconsider the rule in this circuit that requires a defendant who wishes to plead entrapment to admit all elements of the crime, including the element of intent. *United States v. Rodgers*, 755 F.2d 533, 550 (7th Cir.1985), *cert. denied*, — U.S. —, 105 S.Ct. 3532, 87 L.Ed.2d 652 (1985). He acknowledges that this rule is in accord with the Third, Sixth, and Tenth circuits, but argues that a better rule would require a defendant to admit only the acts of a crime, not the intent, before being allowed to plead entrapment. Mathews cites cases from the First, Fifth, and D.C. circuits as examples of decisions that follow this rule. *United States v. Caron*, 588 F.2d 851 (1st Cir.1978); *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984) *(en banc)*; *United States v. Kelly*, 748 F.2d 691 (D.C.Cir.1984). Mathews does not ask us to go so far as those circuits

that he claims allow a defendant to deny all elements of the crime and at the same time plead entrapment. *United States v. Demma*, 523 F.2d 981 (9th Cir.1975); *Crisp v. United States*, 262 F.2d 68 (4th Cir.1958).

[1] Although we acknowledge some diversity of opinion among the circuits, we see no reason to change our rule requiring a defendant to admit all elements of the crime before being allowed to plead entrapment. When a defendant pleads entrapment, he is asserting that, although he had criminal intent, it was "the Government's deception [that implanted] the criminal design in the mind of the defendant." *United States v. Russell*, 411 U.S. 423, 436, 93 S.Ct. 1637, 1645, 36 L.Ed.2d 366 (1973); *United States v. Rodgers*, 755 F.2d 533, 550 (7th Cir.1985). We find this to be inconsistent *per se* with the defense that the defendant never had the requisite criminal intent. We see no reason to allow Mathews or any defendant to plead these defenses simultaneously.

III.

[2] Mathews also complains that the exclusion for cause of several veniremen who expressed misgivings about covert tape recordings created a jury skewed in favor of the government and unrepresentative of the community. He argues that the trial judge should have conducted a more extensive inquiry into the basis for the veniremen's objection to such evidence in order to ascertain whether the veniremen felt they could give the evidence its proper weight despite their initial reservations.

We disagree with Mathews for two reasons. First, a trial judge's questioning during *voir dire* is subject to limited review. In light of the special circumstances of the situation (to be outlined below) and the great deference that we accord trial judges in this area, *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841, 844 (1985), we see no reason to overturn the judgment of the trial court on the basis of the exclusion of these veniremen. Second, the trial judge called a side bar during *voir dire* to give Mathews' counsel the opportunity to suggest an appropriate route for the trial court to take regarding these veniremen. Mathews' counsel expressed no objection and asked the court to proceed as it had been before the side bar. We find it difficult to accept Mathews' belated allegations on appeal that the judge's action taken at Mathews' request denied him his sixth amendment right to an impartial jury representing a cross-section of the community.

A.

The trial judge was forced to deal with a difficult and all too common situation during *voir dire*. The court had properly and methodically questioned the veniremen as a group about their limitations and biases regarding the case. After its first twenty-two questions, the court had excused only six persons for cause. The court's twenty-third question inquired whether the veniremen had "any concern about tape recording conversations when one party is not aware that it is being recorded." (Trial Transcript at 43). One veniremen expressed concern, and the court questioned her in depth about whether her reservations about the evidence-gathering method would interfere with her ability to weigh that evidence, whether she still had reservations knowing that she would only hear the tapes if they were found admissible by the court according to the rules of evidence, and whether her reservations would remain regardless of the nature of the investigation. When the veniremen continued to express doubt, the judge dismissed her.

As acknowledged by counsel for both sides, what followed was a classic case of potential jurors jumping on the opportunity to avoid jury duty by suddenly realizing that they too shared the bias of the veniremen just dismissed. Several veniremen immediately brought their newly discovered problem with accepting covert tape recordings to the attention of the trial judge. The judge dismissed the first bandwagoner without further questioning, knowing the veniremen had heard the examination of the veniremen just dismissed. The judge

dismissed the second and third followers after they offered short explanations of the basis for their objections to taping. When a fourth venireman suddenly discovered a deep-seated distaste for covert taping, the judge questioned her in depth and reiterated that tapes might not even be introduced into evidence and would only be heard if they were found admissible according to the rules of evidence. The veniremen then relented, declared she could give the evidence appropriate weight, and was retained on the panel. Undeterred, a fifth venireman took up the mantle and voiced objections to covert taping. The court was examining him further when still another venireman interrupted with questions regarding the nature of the tapes.

Seeing the direction that the *voir dire* was going, the judge called a side bar. As represented to this court at oral argument by both counsel (both of whom also served as trial counsel), the judge asked both parties for their preferences as to the appropriate manner for the court to deal with this mass exodus of potential jurors. Mathews' counsel admits that he did not object to the actions that the judge had taken up to that point and in fact encouraged him to continue.

The judge then dismissed the veniremen he had been questioning and dealt with the remaining four veniremen who claimed that they too disliked covert taping. The judge questioned the first three of these four in depth, released one and kept two. The final objecting venireman was also released.

With the supply of potential jurors now exhausted, the court called a recess. The following day, the new veniremen expressed no misgivings about taping, and the *voir dire* proceeded without further problem.

B.

We see nothing wrong with the trial judge's conduct of the *voir dire*. At least six times, the judge conducted in depth questioning in front of the panel of veniremen as a group regarding the level of bias necessary to demonstrate cause for being excused from jury duty, bias that must remain regardless of the rules of evidence and the instructions of the judge. The judge need not, as Mathews contends, in every case question each juror individually regarding each possible area of prejudice. We review the *voir dire* only to see "whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present." *United States v. Dellinger*, 472 F.2d 340, 367 (7th Cir.1972), *cert. denied*, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973). We "will not find that a trial court abused its discretion in conducting voir dire where there is 'sufficient questioning to produce, in light of the factual situation involved in the particular trial, some basis for a reasonably knowledgeable exercise of the right of challenge.' " *United States v. Hastings*, 739 F.2d 1269, 1273 (7th Cir. 1984), *cert. denied*, 469 U.S. 1218, 105 S.Ct. 1199, 84 L.Ed.2d 343 (1985) (citations omitted). We may only reverse a trial judge's decision on exclusion of veniremen for cause if it is a "clear case" of prejudicial error. *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841, 844 (1985). The judge's conduct easily satisfies this limited standard of review, and we accordingly decline to disturb the trial court's decision.

Furthermore, Mathews had every opportunity to object during *voir dire* and failed to do so. The judge even asked the parties how they wished him to proceed in light of the developing problem with the veniremen's bias regarding covert taping. Mathews, by his counsel, encouraged the judge to continue as he had been before the side bar, which the judge did. This is clearly a waiver and more of whatever right Mathews may have had to object to the conduct of the *voir dire*.

Finally, we feel compelled also to note that we are uncertain what harm Mathews could claim even if the conduct of the *voir dire* would have been improper. The judge did not fail to exclude for cause a venireman that Mathews wished excluded (which

would have forced Mathews to use a peremptory strike and thus potentially prejudice his case), and the trial judge did not conduct the *voir dire* so that a venireman who may or may not have been prejudiced remained on the panel (which would have resulted in the same harm). Instead, the judge immediately excluded veniremen who expressed some bias against the government without first questioning them further on an individual basis. We are doubtful whether this harmed Mathews in any way or whether any harm that did result can be the basis of a sixth amendment challenge. As stated by the Ninth Circuit in addressing a situation in which the appellant contended that the trial judge had erred in excusing two jurors for cause on his own motion:

> Moreover, regardless of the propriety of excusing two veniremen, we would not be inclined to reverse. The defendant is entitled to an array of impartial jurors to whom he may direct his peremptory challenges but, having been provided with such a panel, he suffers no prejudice if a juror, even without sufficient cause, is excused by the Court.

United States v. Calhoun, 542 F.2d 1094, 1103 (9th Cir.1976), *cert. denied sub nom., Stephenson v. United States*, 429 U.S. 1064, 97 S.Ct. 792, 50 L.Ed.2d 781 (1977).

IV.

Mathews also contends the trial court erred in denying his motion for mistrial based on the prosecution's use of its peremptory strikes to exclude all blacks from the jury. We disagree.

A.

The Supreme Court recently addressed this issue in *Batson v. Kentucky*, — U.S. —, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and the principles elucidated there control this case. In *Batson*, the court established that "the State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause," *Batson*, 106 S.Ct. at 1718, and "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 1719. When a defendant alleges the prosecution has used its peremptory challenges in a discriminatory fashion, therefore, the general principles of Equal Protection apply. *Id.* at 1719.

The burden is on the defendant initially to make "a *prima facie* case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id.* at 1721. To make this showing, it is not necessary for the defendant to show that the prosecutor's actions in past cases have demonstrated a pattern or practice of discriminatory use of peremptory challenges. *Id.* at 1720-21. "A defendant may establish a *prima facie* case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, ... and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* at 1722-23. Then, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used [peremptory challenges] to exclude the veniremen from the petit jury on account of their race." *Id.* at 1723. These "relevant circumstances" may include a pattern of peremptorily striking black jurors, the prosecution's questions and statements during *voir dire*, and the prosecution's statements and actions in exercising his peremptory strikes. *Id.*

If the trial judge determines that the defendant has made a sufficient *prima facie* showing, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 1723. Although "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause," *Id.* at 1723, "the

she along with the other people who had raised similar objections yesterday. I struck for, I think probably self-evident reasons, that type of evidence is going to be important to my trial and I believe that it will be very difficult for me to get a fair hearing on my side of the case if there are people who just plain believe that is not right under any circumstances no matter what the judge should instruct them.

With respect to Ms. Phenix, I noted this morning when I came into the courtroom, I thought yesterday afternoon, as a matter of fact, that I would like to keep her. She is a sort of basic Milwaukee person on paper at least, what we know of her. This morning she was late in coming, she was not the only one, but she was among people who [arrived] after two o'clock this afternoon when the jury was supposed to be here in their seats. And this indicated to me a lack of commitment to the importance of this proceeding. That was one of the reasons why I felt that given a choice between Ms. Phenix and another juror, I would select a juror who evidenced more of a commitment.

In addition to that, while watching her in the courtroom she did not seem to be attentive to the proceedings at hand. I know this is always very difficult to judge these things on the basis of such a short exposure to a person, but that was my impression of her. That is the reason why I decided to strike her.

My last strike as I mentioned a few moments ago, was Mr. Robinson. I believe that is his name, Declinton Robinson. The reason why I struck him is [admittedly a personal] one. I don't know what is going to happen to me if I put this on the record, but I am going to anyway because the Court needs to know my reasons.

Mr. Declinton was sitting directly to my right, only a space of approximately four feet from me, and both yesterday and today he spent a very great deal of time in examining me in a way which I felt was in the end becoming rather hostile. Now, I realize that this is a subjective judgment, but it was very marked to me, Judge. It was something that I noticed and felt was rude for one thing, and indicated one of two things, either he was going to be very strongly in support of my position or he was going to be very strongly against my position. Under those circumstances I felt that there were other jurors who more fit the profile of a juror that I was looking for.

There is always a thousand other things, but I feel that at least this much should be placed on the record at this point because I feel that it would have been to my advantage, rather than my disadvantage to have had black jurors on this particular jury, because my witnesses, too, your Honor, my most important witness, Mr. James DeShaser, is like Mr. Mathews, black, and I feel that it is important that he get a fair hearing, and so I gained nothing. I gained nothing. I have to select my jurors one at a time, as I see it and those are my reasons.

Trial Tr. pp. 83-86. Following this explanation, the judge asked Mathews' attorney for his response, and he pointed out that other white jurors had also been late but had not been struck by the government.

The judge then proceeded to weigh the factors put forth by both sides as well as other surrounding circumstances. The judge stated that he agreed that the first venireman struck had given particularly hesitant responses to the judge's inquiry following the venireman's initial objection to covert taping and that the peremptory strike was "well justified." With regard to the second black venireman struck, the judge also agreed that the person had demonstrated a pointed disinterest in the proceedings evidenced not only by her tardiness but also by her posture and demeanor. With regard to the third venireman struck, the judge noted that the prosecutor's explanation was subjective and not based on factors that the court had also observed but that this did not necessarily undermine her explanation. The court then considered the explanation in light of other surround-

prosecutor may not rebut the defendant's *prima facie* case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." *Id.* Neither may the prosecutor satisfy his burden "by denying that he had a discriminatory motive or 'affirming his good faith in individual selections.'" *Id.* at 1723 (citations omitted). The prosecutor's explanation must be "clear and reasonably specific," it must contain "'legitimate reasons' for exercising the challenges," and it must be "related to the particular case to be tried." *Id.* at 1723 n. 20.

The defendant, of course, bears the ultimate burden of proving intentional discrimination. *Id.* at 1721 and 1723–24. The duty to determine whether such a showing has been made is entrusted to the sound discretion of the trial courts who are "experienced in supervising *voir dire*." *Id.* at 1723.

For purposes of review on appeal, *Batson* reminds us that "'a finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court," and that, "[s]ince the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Id.* at 1724 n. 21. Thus, we may only reverse the trial judge's determination that the prosecution's peremptory challenges were not motivated by intentional discrimination if that determination is clearly erroneous. *United States v. Tucker*, 773 F.2d 136, 142 (7th Cir.1985), *cert. denied*, — U.S. —, 106 S.Ct. 3338, 92 L.Ed.2d 742 (1986).

B.

[3] Applying these principles to the facts here, we have no doubt that the trial court properly denied Mathews' motion for mistrial based on the prosecution's use of peremptory challenges.[1] The judge's inquiry was careful and thorough, and his underlying findings were reasonable and consistent. The trial court's ultimate finding that the government did not intentionally discriminate when exercising its peremptory challenges cannot be said to be clearly erroneous.

The trial judge, without the benefit of *Batson's* specific guidelines, undertook a thorough inquiry in response to Mathews' pre-trial motion challenging the government's use of its peremptory challenges to remove all blacks from the jury. After listening to Mathews' objection outside the presence of the jury, the judge asked the prosecutor for her response. The prosecutor then explained in some detail the basis for each of her strikes against the three black veniremen. We recount it here in full as an example of the type of explanation that satisfies *Batson's* requirements that such explanations be clear and reasonably specific, contain legitimate reasons, and be related to the particular case.

> I did have reasons. The choice that I made this morning was an unusually difficult one, and as [defense counsel] is probably aware, the gentleman, one of the gentlemen who was among the people that I just mentioned, was my last strike, and one over which I hesitated at some length. It is always very difficult to describe your reasons why you choose or do not choose a juror. When you read cases that say you are supposed to tell what your reasons are, I think this must be written by people who never tried a case, but I will do the best I can.
>
> With respect to the lady, Mrs. Switzer, she was [among] those people who indicated a grave reservation with respect to her ability to adequately look at and appraise the tape recording evidence, and

1. Because we find the trial judge's conduct of the proceedings below satisfies *Batson's* requirements, we need not (and expressly do not) decide whether *Batson* applies retroactively to this case. *See Allen v. Hardy*, No. 85-6593, — U.S. —, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986) (*Batson* does not apply retroactively to collateral attack on conviction).

ing circumstances. The court noted that the key witnesses for both sides in this case were black, which would discount any advantage that a discriminating prosecutor might perceive in striking blacks from the jury. The court noted that there was no evidence that the prosecution had maintained a pattern or practice of striking blacks from juries in cases where the defendants are black, and further commented that the court's personal experience showed the contrary. Finally, the court noted that the demeanor of the prosecutor while exercising her peremptory challenges and the time that she took in so doing indicated that she was not simply striking veniremen because they were black but was engaging in a careful process of deliberation based on many factors. In light of all of these circumstances, the judge denied Mathews' motion for mistrial.

The judge's inquiry fits easily into the format established in *Batson*. In his motion, Mathews put before the court the facts that he is black (a cognizable racial group) and that the prosecution used peremptory challenges to strike members of his racial group from the jury. Mathews also noted that the government eliminated all blacks from the jury, not just a few, as additional evidence of the prosecution's discriminatory motive. Although we need not so decide, the trial judge apparently treated this as sufficient *prima facie* evidence of the government's discriminatory intent in exercising its peremptory challenges. The judge then gave the prosecution a chance to rebut this inference with a neutral explanation for challenging the black veniremen. This the government did with an explanation that contained legitimate reasons, was clear, was reasonably specific, and was related to the particular case. The judge, after hearing Mathews' response to that explanation, considered all relevant circumstances and ruled that Mathews had not carried his ultimate burden of proving discriminatory intent.

The judge's inquiry was based on the proper criteria as established in *Batson*. We see no reason to overturn as clearly erroneous the judge's denial of Mathews' motion for mistrial.

V.

In sum, we find it was not error for the trial judge to require Mathews to admit all elements of the crime including intent before allowing him to plead entrapment, it was not error to exclude for cause several veniremen who expressed misgivings regarding the use of covert tapings, and it was not clearly erroneous for the judge to deny Mathews' motion for mistrial based on the prosecution's alleged discriminatory use of peremptory challenges. The decision of the district court is AFFIRMED.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 29, 1986

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 85-2904 v.

FREDERICK MATHEWS,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 85 CR 63

Thomas J. Curran, Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by the attorneys for defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing and suggestion for rehearing en banc. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing and suggestion for rehearing en banc be and the same is hereby, DENIED.

ORIGINAL

No. 86-6109

Supreme Court, U.S.
FILED
FEB 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

FREDERICK MATHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to an entrapment instruction at his trial.

2. Whether the trial court's finding that the prosecutor did not exercise her peremptory challenges on racial grounds was clearly erroneous.

IN THE SUPREME COURT OF THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 101-108) is reported at 803 F.2d 325.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1986. A petition for rehearing was denied on October 29, 1986. The petition for a writ of certiorari was filed on December 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of accepting a gratuity as a public official, in violation of 18 U.S.C. 201(g). He was sentenced to a three-year term of probation. The court of appeals affirmed (Pet. App. 101-108).

1. The evidence at trial showed that between 1982 and 1985, petitioner worked at the Milwaukee office of the Small Business

Administration, where he was in charge of a program designed to aid businesses owned by socially and economically disadvantaged persons. */ Under that program, the SBA obtained government contracts as a primary contractor and subcontracted the work to the businesses targeted by the program. Pet. App. 102.

James DeShazer operated the Midwest Knitting Mills, one of the businesses in the SBA program. Petitioner was DeShazer's main contact at the SBA. Beginning in 1982, petitioner repeatedly asked DeShazer for money to ease his personal financial problems. In 1983, DeShazer lent petitioner $1,500 to enable petitioner to pay his daughter's college expenses. Later, DeShazer lent petitioner $1,200 to enable petitioner to make a mortgage payment. During 1984, petitioner repeatedly asked DeShazer for more money. Pet. App. 102.

During the samer period, Midwest Knitting Mills was having difficulty in fulfilling its contracts and in obtaining advance payments for its products. DeShazer complained to one of his customers, the Defense Department, that he believed that he was being denied advance payments because he had not given petitioner money. The Defense Department reported the allegation to the FBI, which proceeded to investigate the complaint. DeShazer agreed to assist the FBI by recording his conversations with petitioner.

In a February 1985 meeting, DeShazer reminded petitioner that petitioner had asked him for a $4,200 loan. DeShazer told petitioner that he had arranged for a $12,000 loan from which he would give petitioner $4,200. During the next few weeks, DeShazer met or telephoned petitioner several times to discuss his company's financial problems. During one of those meetings, DeShazer told petitioner that because of his own financial prob-

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*/ The summary of the evidence is based principally on the statement of facts in the government's brief in the court of appeals.

lems he would only be able to give petitioner half of the $4,200. On April 23, DeShazer gave petitioner $2,100 at a hotel coffee shop. Petitioner cautioned DeShazer not to mention the money to anyone. Petitioner was arrested as he left the restaurant.

Petitioner testified that he took the $2,100 from DeShazer on the understanding that it was a personal loan and unrelated to petitioner's efforts to secure advance payments for DeShazer's company. Petitioner explained that by November 1984, he no longer had any responsibility over DeShazer's business at the SBA because another official had assumed those duties. Beginning in February 1985, petitioner said, DeShazer repeatedly offered to lend him money because of petitioner's financial problems. Petitioner said he finally accepted the money, but that he cautioned DeShazer not to mention the loan because it would be misconstrued by his supervisors. Petitioner admitted that he had borrowed $1,500 from DeShazer to pay his daughter's college expenses. He said, however, that he had repaid a portion of that loan and that he had never borrowed any more money from DeShazer.

Petitioner requested that the district court charge the jury on the defense of entrapment. The district court denied the request on the ground that petitioner had testified that he had accepted the money without criminal intent, and that he therefore could not present the inconsistent defense of entrapment. The court also remarked that the evidence showing entrapment was "shaky at best."

2. The court of appeals affirmed (Pet. App. 101-108). It held that the trial court correctly denied petitioner's effort to present an entrapment defense to the jury. Adhering to prior circuit precedent, the court reasoned that a defendant cannot simultaneously claim that he had no intent to commit a crime and that he was entrapped into committing it. Pet. App. 102-103.

ARGUMENT

1. Petitioner contends (Pet. 6-15) that the trial court erred by refusing to instruct the jury on the defense of entrapment. He contends that there is a conflict among the circuits over whether a defendant can present inconsistent defenses to the jury by simultaneously denying commission of the crime and asserting that he was entrapped into committing it. That conflict is not presented in this case, however, because petitioner would not have been entitled to an entrapment instruction under the law of any circuit. Even viewing the evidence in the light most favorable to petitioner, there was no basis on which a jury could conclude that the government induced him to commit a crime.

A defendant is entitled to an instruction on an affirmative defense only if the evidence meets minimum standards as to each element of the defense. United States v. Bailey, 444 U.S. 394, 415 (1980); United States v. Stanley, 765 F.2d 1224, 1234 (5th Cir. 1985). A defendant is entitled to an entrapment instruction only if there is some evidence that (1) a government agent induced him to commit the crime, and (2) the defendant was not otherwise predisposed to commit the crime. United States v. Goodacre, 793 F.2d 1124, 1125 (9th Cir. 1986); United States v. Woosley, 761 F.2d 445, 448 (8th Cir. 1985). It is not enough for the defendant to show that the government offered the defendant an opportunity to commit the crime; the evidence must show that the defendant was in some way coerced, pressured, or persuaded to commit the offense. United States v. Ortiz, 804 F.2d 1161, 1165 (10th Cir. 1986); United States v. Luce, 726 F.2d 47, 49 (1st Cir. 1984); United States v. Bagnell, 679 F.2d 826, 835 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983).

The evidence in this case showed only that DeShazer offered petitioner money. DeShazer never coerced or pressured petitioner into accepting the money. Moreover, petitioner never expressed any reluctance to accept it. Even if petitioner accepted the

money only because he was experiencing financial difficulties, an offer of an opportunity to commit a crime is not converted into unlawful inducement merely because the defendant was in financial distress. See United States v. Stenberg, 803 F.2d 422, 432 (9th Cir. 1986); United States v. Dion, 762 F.2d 674, 689 (8th Cir. 1985).

Where, as here, the defendant has not met his initial evidentiary burden, he is not entitled to an entrapment instruction. See, e.g., United States v. Ortiz, 804 F.2d at 1166; United States v. Sarmiento, 786 F.2d 665, 667 (5th Cir. 1986). Thus, regardless of whether a defendant should be permitted to assert inconsistent defenses in an entrapment case, the district court properly refused to give an entrapment charge in light of the absence of any evidence to support that defense.

2. Petitioner also contends (Pet. 15-16) that the district court erred in finding that the prosecutor did not intentionally discriminate against black veniremen in exercising peremptory challenges. This fact-bound question does not merit review.

a. During voir dire, the prosecutor used her peremptory challenges to strike all three black veniremen from the jury. During a hearing following petitioner's objection, the prosecutor explained the reasons she had done so. She pointed out that the first juror had expressed deep reservations about the use of tape-recorded evidence. The second juror, the prosecutor stated, did not appear to take a sufficient interest in the proceedings; in support of that conclusion, the prosecutor observed that the juror had arrived late and appeared inattentive during the jury selection process. As to the third juror, the prosecutor said that she felt that he was staring at her during voir dire and was expressing what she took to be hostility. As a result of that juror's behavior during voir dire, the prosecutor concluded that the juror would either be "very strongly in support of my position or he was going to be very strongly against my position."

As a result, she said, "I felt that there were other jurors who more fit the profile of a juror that I was looking for." Pet. App. 106-107.

The district court accepted the prosecutor's explanation. Striking the first juror, the court found, was "well justified" for the reason given. The court agreed with the prosecutor that the second juror had demonstrated an apparent lack of interest in the proceedings. And the court credited the prosecutor's explanation for stiking the third juror, even though the court had not observed any sign of hostility on the juror's part. The court also noted that the key witnesses on both sides were black, that the prosecutor had not engaged in a practice of striking blacks from the jury in cases in which the defendant was black, and that from the methodical way in which the prosecutor exercised her peremptory challenges, it appeared that her strikes were based on a number of factors and not on a desire to remove all blacks from the jury. Pet. App. 106-108.

b. The court of appeals upheld the district court's finding that the prosecutor did not improperly use her peremptory challenges to strike blacks from the jury. The court found that the prosecutor's response to the charge that she had based her peremptory challenges on racial factors "contained legitimate reasons, was clear, was reasonably specific, and was related to the particular case" (Pet. App. 108). Moreover, the court noted that the trial judge had considered "all relevant circumstances" in finding that petitioner had not carried his ultimate burden of proving discriminatory intent (ibid.). Applying the standards announced in Batson v. Kentucky, No. 84-6263 (Apr. 30, 1986), the court of appeals found no basis for concluding that the district court's finding on the issue of the prosecutor's intent was clearly erroneous.

c. In Batson v. Kentucky, supra, this Court held that the Equal Protection Clause bars a prosecutor from exercising his

peremptory challenges against potential jurors on account of their race. It further held that once a defendant makes a prima facie case of discriminatory use of peremptory challenges, the burden shifts to the government to show a neutral explanation for the challenges. A prosecutor must then "articulate a neutral explanation related to the particular case to be tried." Batson, slip op. 17. Because the issue of intentional racial discrimination is factual, the Court noted that reviewing courts should give "great deference" to a trial court's findings on the issue. Id. at 18 n. 21.

Here, the prosecutor gave a "neutral explanation" for the use of her challenges. She explained that the first juror would not have fairly accepted the use of tape recorded evidence, the second was not committed to the proceedings, and the third was seemingly hostile toward her. The district court's conclusion that the prosecutor did not engage in intentional racial discrimination in the use of her challenges was manifestly justified. Moreover, as the court of appeals noted, the prosecutor's explanation of the legitimate reasons for her challenges -- even though given before Batson was decided -- was a model of the kind of clear, specific explanation that Batson envisions. The concurrent factual findings of the two lower courts on this issue warrant no further review. See Tiffany Fine Arts v. United States, 469 U.S. 310, 317-318 & n.5 (1985).

Petitioner contends (Pet. 15) that the prosecutor's explanation for challenging the third juror -- because he appeared to be hostile to her -- is inadequate under Batson. But Batson does not suggest that subjective impressions may not be a legitimate basis on which to exercise peremptory challenges. Batson simply forecloses the prosecutor from exercising challenges on the basis of race: on the "assumption -- or his intuitive judgment -- that [the challenged jurors] -- would be partial to the defendant because of their shared race." Batson, slip op. 17. As the

district court and the court of appeals found, the prosecutor's judgment in this case was not based on any such assumption.

Petitioner also contends that the prosecutor's reasons for striking the first two black jurors was invalid because there was a white juror who was late but was not struck, and because there was a white juror who expressed reservations about tape-recorded evidence but was not struck (Pet. 5, 15-16). As the prosecutor explained (Pet. App. 106), she struck several persons who had expressed reservations about tape-recorded evidence; the fact that she failed to strike one white juror who expressed such reservations is hardly probative of racial animus. As to the second juror, the prosecutor did not strike her simply because she was late. The prosecutor struck that juror because she seemed uninterested in the proceedings; her lateness was only one factor contributing to that judgment (see Pet. App. 106). The fact that a white juror was also late therefore does not support petitioner's claim that the prosecutor exercised her peremptory challenges on racial grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1987

Supreme Court, U.S.
FILED
MAY 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-6109

In the Supreme Court of the United States

OCTOBER TERM, 1986

FREDERICK MATHEWS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 27, 1986
CERTIORARI GRANTED MARCH 30, 1987

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Trial court's denial of second motion in limine on entrapment issue	2
Excerpts from testimony of James De Shazer	5
Stipulation as to tape	107
Stipulation as to FBI 302 regarding James De Shazer	108
Stipulation as to Mr. Pruit's testimony about Mr. Anderson	113
Excerpts from testimony of Frederick Mathews	114
Trial court's denial of motion for mistrial on entrapment issue	131
Decision of the United States Court of Appeals for the Seventh Circuit	132
Denial of Petition for Rehearing with Suggestion for Rehearing *En Banc*	147
Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, March 30, 1987	149

RELEVANT DOCKET ENTRIES

4/24/85	Complaint and Warrant.
4/24/85	Initial appearance.
5/7/85	Indictment.
5/9/85	Arraignment; not guilty plea.
8/5/85	Jury trial commenced and adjourned to 8/12/85.
8/6/85	Defendant's Second Motion in Limine (entrapment defense), with supporting affidavit and memorandum.
8/12/85	Jury trial continued; defendant's second Motion in Limine denied [oral decision; no written decision or order entered].
8/19/85	Jury trial concluded; defendant's motion for mistrial on entrapment issue denied [oral decision; no written decision or order entered]; jury returned verdict finding defendant guilty.
10/16/85	Sentencing: imposition of sentence suspended; 3 years probation; special condition of house arrest for two years.
10/25/85	Notice of Appeal.
1/13/86	Application to proceed *in forma pauperis* and trial court's order granting application.
10/9/86	Decision of United States Court of Appeals for the Seventh Circuit.
10/29/86	Denial of defendant-appellant's petition for rehearing with suggestion for rehearing *en banc*.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 85-CR-63

UNITED STATES,

Plaintiff,

—vs—

FREDERICK MATHEWS,

Defendant.

TRIAL COURT'S DENIAL OF SECOND MOTION IN LIMINE ON ENTRAPMENT ISSUE

(R. 37: 87B-89)

---

* * * *

[87-B] COURT: All right. With respect to the first motion in limine which the defendants sought to suppress the reference to sound recordings made of certain conversations between the defendant and a witness by the name of DeShazer, the Court reviewed a length a number of tapes and these tape recordings at best are not very good, but it does appear that if one were to study them and replay them that you could at least for the most part determine what the words were that were used by the participants to that conversation.

Not knowing anything about the case other than the indictment, it is difficult for the Court to determine what, if any part of those tapes were of any particular significance to either the Government or the defend- [88] ant's side of the case.

As a result, as I have previously indicated to counsel in chambers, I am going to deny the motion in limine with respect to the suppression with the understanding, of course, that counsel can, in the course of trial, raise objections that he might have to those portions of the transcript of those recordings which he feels are incorrect or are subject to some other interpretation, and if that is of any significance at that time, certainly the defendant would be given an opportunity to propose to the jury what the defendant feels is the accurate transcript as opposed to what has been submitted.

Its my understanding that that has been made available to the defendant as of Monday, is that correct?

MS. KEARNEY: Your Honor, that is correct, but not complete. Mr. Kaufman and I have listened to the tapes together, as a matter of fact, and incorporated some joint corrections in the final version. Mr. Kaufman had the tapes that were, or the transcript that the—the transcripts that were filed with this Court at the end of business on Friday, Saturday morning.

COURT: All right.

MR. KAUFMAN: That is correct, your Honor.

COURT: In any event, I think that the Court's position is that it will allow that matter to be re- [89] opened in the event that it does appear that some portion of that tape is significant to the case and bears some other interpretation.

Now, with respect to the second motion in limine which deals with the matter of entrapment, the Court has advised counsel that it is going to deny that second motion.

As counsel knows, the law is that in the event of entrapment that the defendant must concede that what he did was wrong, and that he was encouraged to do that by virtue of the acts of the Government or Government witnesses, or other individuals acting for or on behalf of the Government.

The defense in this case is a denial that the defendant did in fact engage in the conduct that he has been accused of before it would appear that the defense of entrapment is not available to him.

For that reason the second motion in limine is denied.

* * * *

EXCERPTS FROM TESTIMONY OF JAMES DE SHAZER

(R. 37: 167-217, 233-330)

* * * *

[167] MR. JAMES DE SHAZER, called as a witness and after first having been duly sworn upon his oath, testified as follows, to-wit:

CLERK: State your full name and spell your last name for the record.

MR. DE SHAZER: My name is James DeShazer. The last name is spelled D-e S-h-a-z-e-r.

DIRECT EXAMINATION

BY MS. KEARNEY:

Q Mr. DeShazer, may I ask you how old you are?

A I am forty-six years old.

Q How are you presently employed, sir?

A I am employed in the knitting business.

Q Are you the owner of your own company?

A Yes, I am.

Q What is the name of that company, sir?

A The name of the company is Midwest Knitting Mills, Inc.

Q How long have you been in the knitting business over all?

A Since September of 1969.

Q Before Midwest Knitting Mills, were you associated with another company?

A Yes, I was.

Q What was the name of that company, sir?

A The Kohl Food chain.

[168] Q During what period of time were you associated with Kohls?

A From 1963 until 1969.

Q In what capacity, sir?

A First as assistant and then promoted to manager of the store.

Q Now, was it after that that you entered into the knitting business?

A Yes, it was.

Q And between the time you left Kohls and the time you began Midwest Knitting Mills, were you associated with a company of a different name?

Q Yes, I was.

Q And what was that company, sir?

A Service Operations Systems.

Q And when did you become associated with Service Operations Systems?

A In 1957.

Q Okey. Let's start with 1969, when you left there, the Kohls System, Okey? Between 1969 and the time you started Midwest Knitting Mills, were you associated with another knitting company?

A No, I was not.

Q Did the Midwest Knitting Mills have another name at some [169] time?

A Yes, it did.

Q What was the name, sir, that it was used at that point?

A Esquire Knitting Mills.

Q How were you employed between 1969 and 1977?

Q I was employed in the knitting business under the name of Esquire Knitting.

Q Are you the owner and sole operator of the Midwest Knitting Mills?

A Yes, I am.

Q Is that also the case with the Esquire, sir?

A No, I had some partners.

Q Did you associate with that business as a manager as well as a person with ownership interest?

A Yes, I did.

Q So can you tell us how long, overall, you have been in the knitting business?

A Sixteen years.

Q Mr. DeShazer, are you married?

A Yes, I am.

Q Children?

A Yes, I have.

Q Do they live here in Milwaukee?

A Yes, they do.

Q And you do too, is that right?

[170] A Yes.

Q Can you tell us where, sir?

A I live at 6920 North Beachtree Drive, in Glendale, Wisconsin.

Q You a college graduate, Mr. DeShazer?

A No, I am not.

Q How far did you go to school?

A I finished highschool.

Q Was that here in Milwaukee as well?

A No, it was not.

Q Where did that take place?

A That was in Arkansas.

Q When did you come to Milwaukee?

A In 1957.

Q Sir, could you tell us a little bit about Midwest Knitting Mills, the kind of items that it makes?

A Manufacture knitted headwear. Basically its a cuff style knit cap, and we manufacture a knit scarf, and we also manufacture some leg items, namely leg warmers.

Q Can you tell us a representative sample of the customers that you had, let's say since 1980?

A Since 1980, we have sold Boston Store, we have sold the Army Airforce Exchange Service out of Dallas, Texas. We have sold to the McCormick Corporation out of York, Pennsylvania, and we have sold the Department of Defense. [171] and there are a number of smaller chains that we have also sold merchandise to.

Q So you have had both government and private sector contracts, is that right?

A That is correct.

Q Over the years have you had a relationship, you and your company, with the Small Business Administration?

A We have.

Q Can you tell us in general terms what that relationship is?

A In 1970, we received a Small Business loan.

Q This was Esquire?

A Yes, it was. And it was a guaranteed loan by the Small Business Administration for $25,000.00.

Q And you have been working in one way or another with SBA ever since?

A We have.

Q Is Midwest Knitting Mills a company that is qualified to participate in the SBA socalled 8A program?

A Yes, we are.

Q Do you know, sir, when your company first became qualified to participate in that program?

A In 1977.

Q In 1977 through the present time can you tell us how many contracts you have had in connection with the 8A [172] program?

A Approximately eight.

Q And were these for the kind of knitted headwear that you have described for us a few moments ago?

A Yes.

Q Now, Mr. DeShazer, do you know the gentleman seated at the table behind me, to my left?

A Yes, I do.

Q Who is he, sir?

A Mr. Frederick Mathews.

Q Can you tell me, sir, how it is that you came to know Mr. Mathews?

A I first came to know Mr. Mathews in 1979, personally. At that time he was a loan officer with the

Small Business Administration, and he worked on a loan proposal that I had before the agency.

Q Did you know who he was before you first met him at that time in 1979?

A Yes, I knew that he worked for the Small Business Administration, yes.

Q Did you know him through anyother channel prior to that time?

A I had seen him occasionally on a social basis in a cocktail lounge that I was going to. Not socially with him but I saw him on those basis.

[173] Q Can you tell us, sir, whether prior to the time you started doing business with him, with the SBA, there was any connection, any family type connection between you and Mr. Mathews?

A No, there was not.

Q Are you acquainted with any member of Mr. Mathews' family?

A Yes, I am.

Q Who is that, sir?

A I know his brother, Donald, quite well.

Q And how long have you known Donald?

A I have known Donald for approximately probably ten years or more.

Q Did your friendship with his brother Donald include Mr. Mathews up until the time you met him through the SBA?

A No, it didn't.

Q Mr. DeShazer, prior to the time you first met with Mr. Mathews of the SBA in the transaction involving the loan that you just described, had you dealt with someone else in the Small Business Administration organization?

A Yes, I had.

Q Who is that?

A I worked with a gentleman by the name of Mr. Earl Knuth.

Q Is he still with that agency?

[174] A No, he is not.

Q Was he here in the Milwaukee office?

A Yes.

Q And did you work with other people in the SBA prior to that time besides Mr. Mathews?

A I did.

Q Can you recall who those people were?

A One of the gentlemen that I worked with was Mr. Charles Holley.

Q Is he with that agency now?

A No, he is not there.

Q You know how long he has been gone from that agency?

A Not really. But sometime I will say, seven, eight years.

Q How did it come to be that you started dealing with Mr. Mathews at the Small Business Administration here in Milwaukee?

A Mr. Mathews was a business development specialist and the fact that we were in the 8A program he worked with all of the 8A contractors.

Q During the years 1983, 1984, early 1985, can you tell us, Mr. DeShazer, who was your main point of contact at the SBA office here in Milwaukee?

A Mr. Mathews.

Q I would like to direct your attention to the year 1982, Mr. DeShazer, do you have that year in mind?

[175] A 1982, yes.

Q Did you at that time have any projects under way that involved the 8A contracts with the SBA?

A We had contracts, yes.

Q And did those extend into the year 1983?

A Yes.

Q Did you work with Mr. Mathews in connection with those projects?

A Not directly with Mr. Mathews, no.

Q Who did you work with in connection with those projects?

A Worked with Ms. Linda Anderson out of the Chicago office.

Q Did there come a time that you no longer dealt with Ms. Anderson?

A Yes.

Q And can you tell us why you no longer dealt with her?

A She was transferred to the New Orleans area.

Q You recall about when this took place?

A That took place in 1984. I think she left in July of 1984.

Q During the 1983 time period did you work together with Mr. Mathews on any 8A contracts?

A No, I didn't.

Q Now, when was it, sir, that you began working with Mr. Mathews on your 8A contracts? Can you tell us approximately, if you recall?

[176] A Yes, I started working with Mr. Mathews directly in December of 1983.

Q Can you recall the occasion when that type of relationship started?

A Yes. I was informed by Ms. Anderson, that she was going to be leaving and that I would be working with Mr. Mathews, and that all of my association with the agency in reference to the 8A contract would be directly with Mr. Mathews.

Q During the period of 1983, of December, 1983, through April of this year, did you in fact continue that relationship with Mr. Mathews?

A Yes, I did.

Q How often would you say that you communicated with Mr. Mathews during that period of time?

A Some times as many as five times a week.

Q What were the purposes of these many communications?

A Negotiations on contracts, price negotiations on contracts, supplying necessary data for the contract financing, and contract advance payments.

Q Now, during the period 1979, when you first met Mr. Mathews, at the Small Business Administration, to the time that you started dealing with him on a virtually daily basis after this Ms. Anderson's departure, did you have, in fact have business dealings with Mr. Mathews [177] here in the Milwaukee office of the SBA?

A Yes.

Q And what was the nature of the dealings that you had with him during that period of time, Mr. DeShazer?

A Mr. Mathews would review our business development, offer ideas, listen to mine, suggest different ideas to strengthen the company financially or to assist us into getting into the private sector, and basically just an overall supervision of our management of the company.

Q During this earlier period of time, how often would you say that you consulted with Mr. Mathews on the topics that involved your business?

A It was very seldom. I would say maybe four times a year.

Q During this period of time and I direct your attention to early 1983, do you recall a particular meeting with Mr. Mathews?

A In 1983?

Q Yes, sir.

A The meeting that I had with Mr. Mathews in 1983 was in relationship to a pending contract that was going to be awarded to me.

Q What contract was that, sir? What was it for?

A That was a Navy contract for Navy watch caps.

Q What was the purpose of your meeting with Mr. Mathews at that time?

[178] A We had to give him documentation to qualify for an advance payment that we were going to require to do the contract.

Q And was it Mr. Mathews who—Who was it in the SBA organization to whom you would submit these necessary documents?

A That was to Mr. Mathews.

Q Do you recall approximately when this meeting took place, sir?

A I don't recall the date. All I know that it was in December, because I had to submit those documents prior to the awarding of the contract, and we had been given instructions that the contract was going to be awarded in January of '84.

Q Now, I would like to direct your attention to February of 1984. You have that time frame in mind, sir?

A Yes.

Q Did the time come during that particular month when you had certain expectations with respect to those advance payments?

A Yes.

Q Can you tell us what those expectations were?

A We expected to receive an advance payment in the amount of two hundred and nine thousand dollars, which was the original requested amount.

[179] Q And when did you expect those payments, sir?

A We expected those payments based on the information that Mr. Mathews had given us in approximately maximum time of sixty days after they awarded the contract.

Q What was your expectation based on?

A It was based on the information that I received from Mr. Mathews.

Q And had you had previous experience with the advance payments, Mr. DeShazer?

A Yes.

Q Did that enter into your expectation as well?

A Yes.

Q Now, in February of 1984 do you recall whether Mr. Mathews requested a meeting with you with respect

to the documentation required for those advance payments?

A Yes, I do.

Q And where did that meeting actually take place, by the way?

A It did.

Q And where did that meeting take place?

A That meeting took place at a restaurant called, at that time it was Joe Joe's out on Port Washington and Silver Spring.

Q During the course of that meeting was the conversation directed at all times to the topic of the advance [180] payments that you were expecting to receive?

A No, it was not.

Q Mr. DeShazer, what else did you and Mr. Mathews talk about at that time?

A When I came to the table Mr. Mathews was at the restaurant before me. When I came to the table and sit down it was small talk. He asked me how I was doing, how things were going, and I told him we were trying to do some commercial work, trying to gear up for the government contract. At that time he told me that he had some personal problems.

Q What sort, sir?

A He said that he needed some money.

Q Did he tell you why?

A At that time he didn't say why. I really didn't give him an opportunity to explain to me his reason.

Q How much money did he say he needed?

A When he asked me, I—he says he needed some money. I says, what do you mean you need some money? He said, well, I got some things I need to do, and I need about three. I said three, three what? Three hundred dollars? He said no, three thousand, that was the expression he made when he said three thousand.

Q How did you respond to his request, Mr. DeShazer?

A I told him I don't have three thousand dollars. And at [181] that time he says, I know that I owe you

money. I says I thought we came to discuss the documents on the advance payments. He had originally said that he was ready when he called me to ask for the meeting he said he wanted to review the documents because he was ready to send the documents to the Regional office in Chicago, and he would like to meet with me to review those documents to make sure everything is in order. He asked me, would you like to have lunch with me to review them? I said sure. And when I got there he asked the question, I said I thought we came to—I said this what we came to talk about? I thought we came to review the documents for the advance payment.

Q Did you ever review those documents at that meeting, sir?

A No. He says yah, he says—no we didn't. He says, yes, I do want to review those. I said, well, what is it that you want to ask me? I says, I don't see, I don't see any documents. What is it that you want to ask me? He says, well, I have it in my head, what I want to ask you. I says, fine, what is it? He says, well, I think I really have everything. And I says, Fred, I says, I thought we came to review the documents. I really have to get back. I says, because I had told my banker that I was coming to talk to you in regard to the advance payments. As a matter of fact, I [182] says, I had told him that if you could give me an approximate time on the advance payment I was supposed to go back to the bank after our meeting to see if they could work with me on advancing me funds immediately, so that I could get into my contract and so when the advance payments come we would just offset that. I said if this is what we have to talk about I really have to go.

Q Was it at that point when he raised the issue that you talked about before, that the three thousand dollars—

A Yes.

Q Now, was this the first time that Mr. Mathews had ever asked you for money, Mr. DeShazer?

A No, it was not the first time.

Q Did you finish your answer?

A It was not the first time.

Q When was the first time?

The first time that he asked me was in 1982. At that time I was trying to arrange a banking relationship with a banker to finance my commercial business, and Mr. Mathews called me one day and said that he would like to meet with me. He said there was something I wanted to talk to you about. I says, okey, where would you like to meet? He says meet me tonight at seven o'clock at Chatmore's. I said, well, where is Chatmore's? He said [183] out at 19th and Atkinson.

Q Did you in fact meet him that evening?

A Yes, I did.

Q What did you talk about?

A When I met him he says, have you been able to arrange any financial backing with banks, and I says, no. He says, well, I think that I can get you a bank. I said, well, it sounds great. I said where is the bank, who is the banker? He says, well, if you will give me twelve hundred dollars I guaranty you I will get you a bank. And I asked him again, well, who is the banki? And he said, well, if you will give me twelve hundred dollars I will guarnaty you the bank. I said, well, I don't have no twelve hundred dollars. That was the first time.

Q Did he indicate what he wanted the twelve hundred dollars for?

A No, he didn't. I really didn't give him a chance to tell me what he wanted it for.

Q Did there come a time when he asked you for money again?

A Yes.

Q When was the next time?

A The next time was in February of 1983.

Q Can you tell us the circumstances under which that occurred, please?

A Mr. Mathews called me and told me that he wanted to talk [184] with me, and that he would like to meet me.

I says, okey, and we arranged to meet at a place called Toran's which is a block from our business. And when I met him he says, well, it is nothing to do with business. He says, there is no problem. He said this, it is really kind of personal. I says, how personal? He says, well, actually, I have some financial problems, and he said that he had a daughter that was in college and he needed some money to pay her tuition, or either keep her in tuition. And he says, I have a vacation check coming in two weeks. He said, I really need about fifteen hundred dollars, he says, if you could lend me that fifteen hundred dollars, he said, I could pay you back in two weeks when I get my vacation check.

Q Did you lend him fifteen hundred dollars?

A Well, I told him I didn't have it. I said, I don't have no fifteen hundred dollars. I said, how serious is the problem? He says, well, you know, she is going to get expelled from school or something. I said, well, I know a guy that I have been borrowing from on occasion when I got a serious situation. If it is that critical, I said, you sure that you will have the, you will be getting your vacation check and you can pay him back? I says, he doesn't know you, I said, but he knows me. I will borrow it from him. I said, I think he will let me [185] have it.

Q Who is this person, sir?

A He is a friend of mine by the name of Lewis Sherman.

Q What was your relationship with Mr. Sherman at that time? How did you know him?

A Well, I knew him as a customer and also as a friend.

Q Did you go to Mr. Sherman?

A I called him and asked him if he could do it, and explained to him the reason. And he said he would, if I would be responsible for it.

Q And did you then get the money from Mr. Sherman?

A Yes, I got the fifteen hundred dollars.

Q And what did you do with it then?

A I gave it to Mr. Mathews.

Q And when did he indicate that he would be able to give it back to you again? I am sorry.

A He told me that he had a vacation check coming in two weeks and that he would repay me the fifteen hundred dollars in two weeks.

Q What happened at the end of the two weeks?

A Needless to say, I didn't get the fifteen hundred dollars. And about two or three weeks after that I had some business with him in reference to my company. And he says, well, I am going to be getting that money pretty soon, I haven't forgotton. And I said, well, I [186] hope so because Lewis has already asked me about it

Q Did there come a time thereafter when he asked you for more money?

A Yes.

Q Will you tell us the circumstances under which this occurred, sir?

A Well, sometime after that he called me and told me that he wanted to meet with me for lunch. And I says okey. We agreed to meet the next day. And when I met him at this place called Boobies on 4th and Garfield, I think, when I went to this place he said, lets go outside and sit in the car. I says, all right. And when I went outside and got in the car with him he had some papers that he had from, he says from the Glendale Bank, and he showed me the banker's card. He said he was getting a second mortgage on his house and he says, I am going to be able to pay you the fifteen hundred dollars back. I said that will be good because Lewis has asked me about it several times. He says, but I got a problem. I says, what do you mean? And he says, well, he had some money in his hand, I don't know, a thousand, maybe twelve hundred dollars, and he says, see, I got this money. He says, I—the banker had already agreed to give me

the second mortgage on my house, and I am going to get a second mortgage. I am going to pay you your [187] money back, but I am delinquent on my payment, and before I can get the second mortgage loan, I have to bring my notes current. So I still need twelve hundred more dollars. So he said, I got the twelve hundred dollars right here. I said, yeh. I said, how far behind are you? I think he answered me, but I can't really recall if he really did. He says, well, I need twelve hundred more dollars. You think you could let me have the twelve hundred dollars to bring the payments current and then he would give me the second mortgage and I will pay you back the twenty-seven hundred dollars.

Q Did you have the money at the time, sir?

A No. No, I told him I didn't have it .

Q Did you make an effort to get it?

A He asked me, could I get it from the same person? I said probably. So I says, but this guy has already asked me several times about the fifteen hundred dollars.

Q Did you go to Mr. Sherman again?

A Yes, I did.

Q What did he do?

A Well, very reluctant, and Lewis says, Jim, he says, I don't like this, he says, but if you think its legitimate, I will give you the twelve hundred dollars. Lewis, I said, I saw the papers. He said, did you see the cars? I said no, I said, he showed me the papers [188] that he had worked out with the banker and he had the banker's card. And he said he had a prior relationship with the banker, and he was going to be getting the money. He says, in a day or two I will be able to pay you back.

Q Then did Mr. Sherman give you the money?

A Mr. Sherman gave me the twelve hundred dollars.

Q And what did you do with it?

A I gave it to Mr. Mathews.

Q Did you receive your money back at the end of the two days?

A No.

Q Now, Mr. DeShazer, I would like to again direct your attention to the year 1984, okey? And I would like to ask you whether there came a time in December of 19— or excuse me, let me rephrase that.

I would like to ask you, sir, whether after the first conversation you described to us, that conversation about the three thousand dollars, whether after that point you received any other requests for money from Mr. Mathews?

A Yes, I did.

Q Could you tell us approximately how many requests like that you received?

A In one particular day I counted the phone calls, it was seven.

[189] Q How many altogether?

A I can identify nine.

Q Over what period of time?

A That was over a period of, I would say, five months.

Q Ending when, sir?

A The requests stopped in July of 1984.

Q Did you give Mr. Mathews any additional money as a result of those requests?

A I gave Mr. Mathews an additional two hundred dollars after the twelve hundred dollars during the time that he said he was waiting for the papers to be executed at the bank to get his money.

Q But that wasn't in 1984, right? That was in 1983?

A That was in '83.

Q Okey. Now, in late 1984, November of 1984, did you make additional efforts to get your money back?

A Yes, I wrote Mr. Mathews a letter and told him that I was having some serious financial problems myself, and I related the time that he came to me, that he said he desperately needed the money. Even though I didn't have it, I borrowed the money and gave it to him, I would like to be paid back, needed my money.

Q Now, up until the time you wrote this letter, Mr. DeShazer, had you received repayment of any of the money that you had loaned or given to Mr. Mathews?

[190] A No, I had not.

Q Mr. DeShazer, I would like to show you what has been marked Government's Exhibit 13, ask you whether you are familiar with that document?

A Yes, I am.

Q What is Exhibit 13, sir?

A It's a letter that I wrote to Fred on November 23, 1984, requesting repayment of the money that he had borrowed from me.

MS. KEARNEY: Your Honor, at this time I move Exhibit 13 into evidence.

MR. KAUFMAN: No objection.

COURT: Exhibit 13 will be received.

MS. KEARNEY

Q Mr. DeShazer, could you read Exhibit 13, please?

MR. KAUFMAN: I think it speaks for itself.

MS. KEARNEY: Your Honor, at this time I would like for Mr. DeShazer to read the letter. I think it is appropriate.

COURT: Is there something in the letter that is different from what he has testified to already?

MS. KEARNEY: I would like to ask him a question about a portion of the last part of the letter, sir.

COURT: All right, you may proceed to do so.

[191] A November the 23rd, 1984. Mr. Fred Mathews, 9633 West Reo, Milwaukee, Wisconsin, 53225.

Dear Fred,

In February of 1983 I loaned you $1500.00 and four months later you wanted to borrow another $1200.00, of which I loaned to you and you later borrowed another $200.00. You promised to pay me back the $1500.00 in two weeks when you received your vacation check, and $1200.00 you promised to pay along with the $1500.00, totalling $2700.00. The following week you promised—the following week because—

I'm sorry, I will start this over.

Okey, I'll have to start over.

MS. KEARNEY

Q Why don't you just start with the following week, sir, I think you are doing fine.

A Yes, I would like to start the whole letter over.

Q Have you made an error?

A No, I was just, I'm—I would like to start the whole letter over.

Q Okey. I think for purposes of the record it would be better if you just started where you left off.

A Okey.

In two weeks, when you receive your vacation check and [192] $1200.00 you promised to pay along with the $1500.00, total $2700.00, the following week because you were getting a second mortgage on your home. And when you asked for the additional $200.00 again you promised to pay the entire $2900.00 from money you were to receive through a second mortgage on your house.

Fred, I was very uncomfortable when you first approached me for these personal loans, and the other times you approached me for money. I really need my money at once, and if you cannot repay the entire balance of $2,900.00 now, I would like $1500.00 now and the balance by December the 15th, 1984. You seemed so desperate when you asked for these loans, and you promised to repay me in a short period of time. I am desperate for my money so please call me when you receive this letter, so that I will know when to expect repayment.

Q May I see the exhibit for a moment?

Could I ask you, Mr. DeShazer, what you meant when you said "Fred, I was very uncomfortable when you first approached me for this personal loan and the other times you approached me for money"?

A Well, it is kind of like if the pastor of your church would say to you, let's stop in and have a drink at a tavern, it is not that I condone the drinking in [193] taverns, but you just don't expect to be asked that by the pastor of your church. I didn't expect him to do that, so I felt very uncomfortable.

Q Because of his position?

A Because of his position. He is a business development specialist, and I kind of lost something when he asked me for money.

Q Now, Mr. DeShazer, throughout 1984, were you in communication with certain representatives of the military contractors that you had contracts with?

A Yes, I was.

Q Do you know a gentleman named Commander James Ullrich?

A Yes.

Q Ullrich?

A Ullrich, yes, I do.

Q Who is he?

A At that time he was the head of the Department of the Department of Defense, the DCASMA here in Milwaukee.

Q Did there come a time, sir, when you shared certain sentiments with the commander about Mr. Mathews?

A Yes.

Q Can you tell us how that came about?

A I had mentioned the problems that I was having with my inspector, Vicki Ostrey.

Q Who is she with, sir?

[194] A She is with the Department of Defense. And she was very upset, because we were concerned, and she was constantly asking me when I was going to get into the contracts. And I told her that I didn't really think I was going to get started too soon, I said because, she said, well, what's wrong? I said, well, the documents for the payments, I don't feel as though they have been submitted to the proper people, and I don't think they are going to be submitted until I do what the representative of the Small Business Administration had been requesting of me. She said what do you mean? I said, well, Mr. Mathews, that is I said Fred, actually Mathews. I says he's been asking me for money since February. I have not given it to him. I have a feeling that he is not

submitted the documents. She said, well, he is not supposed to do that. I said, I know he is not supposed to do that, but he has on many times.

And she was very upset about it and she reported to Commander Ullrich and after that Commander Ullrich came to visit me and asked me if this is true. And I told him it was true. And I told him how long it had been going on. And that at that time the company was losing serious dollars because the contracts weren't there, we weren't producing the contract that we had projected to produce. And he says, well, this can't [195] continue. He says—

MR. KAUFMAN: Judge, can we have him testify on his own, and not the hearsay statement?

COURT: Your objection is—?

MR. KAUFMAN: Hearsay.

COURT: Sustained.

MS. KEARNEY

Q Mr. DeShazer, could you tell us approximately at what point in time, as closely as you can recall, that you had the conversation with the commander?

A The conversation with the commander was in October of '84. I think it was in October of '84.

Q Did you also have occasion to mention this problem to a representative of your bank?

A Yes, I did.

Q Who is that person?

A I mentioned it to Mr. Kenneth Little in February of '84.

Q And what was your relationship with Mr. Little?

A He was my banker.

Q What bank is that, Mr. DeShazer?

A The North Milwaukee State Bank.

Q Did you personally contact any law enforcement agency about these problems?

A No, I did not.

Q Did there come a time when you had some conversations [196] with the law enforcement agency about these problems?

A Yes, I did.

Q And who was that that you had contact with about these problems?

A It was Agent Donald Woodring.

Q Of what agency?

A The FBI.

Q When did this occur?

A This was in 1985, I think it was in January. I don't recall the exact date, but I know it was in 1985.

Q Do you recall where this conversation took place?

A With Agent Woodring?

Q Yes.

A It took place in my business.

Q Was this conversation at your instigation or their's?

A They came to me based upon the information they had received from Commander Ullrich.

Q And during—by "they", was there another agent that came with Special Agent Woodring?

A There was another agent. I think it was John Ade, I am not sure. There was another agent with him, I do know that.

Q And in response to their questions did you tell them essentially what you just told us here today?

A Yes, I did.

[197] Q At that time did they make any requests of you, Mr. DeShazer?

A They did not.

Q Did they discuss with you any further steps that they might take, you know, in connection with this matter?

A No. Because the day they came I was not expecting them and I was involved in some other business with another gentleman. We made an appointment for them the following day.

Q Did you meet with them again the following day?

A Yes, I did.

Q Where did that meeting take place?

A Took place at my business.

Q And during that meeting what was the subject of the discussion that you had with them?

A The subject of that meeting was the Frederick Mathews issue, in reference to the information they had received from Commander Ullrich.

Q At that time did they ask you if you would be willing to help them?

A They did.

Q What did you say?

A I agreed.

Q What was it that they asked you to do, Mr. DeShazer, to help them in their investigation?

[198] A He more or less asked me to relate what happened up until the time we reported to Commander Ullrich, and at that time I gave him the whole story, but I also told him that I had no proof other than what I said.

Q By "no proof", what did you mean, no documents or that sort of thing?

A I had no documentation to verify what I had told him and everybody else.

Q Did Mr. Woodring ask if you would be willing to be part of the conversation that, with Mr. Mathews, that would be recorded?

A He did.

Q And was that to be a part of the investigation to find out what was going on with Mr. Mathews?

A Yes, it was.

Q What was your response to that request, Mr. DeShazer?

A I told him that if they could supply me with the equipment that was necessary, that I thought as though that the evidence could be obtained.

Q Now, was there any discussion during that conversation or the first one that you had with Special Agent Woodring, of whether you were supposed to get anything in return for your help?

A No, it was not.

Q It wasn't discussed at all?

[199] A No, it was not.

Q Had you ever had any discussions with any representatives of the Government about whether you were supposed to get something in return for your help?

A No, I did not.

Q Has anybody ever told you whether or not you would be receiving any kind of benefit?

A No.

Q During January, February of this year, Mr. DeShazer, what was the status of your SBA contracts?

A No activity.

Q Did you go to somebody at the SBA about it?

A Yes, I did.

Q Who was that person?

A I talked to Mr. Robert Henderson, who is the Deputy Director out of Madison, Wisconsin.

Q And how did it come to be that you spoke to Mr. Henderson about the inactivity that you were experiencing?

A I called Mr. Mathews one day and asked him about the documents that I had submitted for some payments on a contract that was awarded to me in September of 1984, and Mr. Mathews informed me that the documents had not been submitted to Chicago, even though the contract had [200] been awarded five month prior, and I got very upset with him, and I called Mr. Robert Henderson in the Madison office of the SBA and told him that I was very upset and why, because the document that was supposed to have gone out five days earlier at his request, was still in Milwaukee.

Q Now, Mr. DeShazer, what was your understanding during 1984, of the early part of 1985, about who

was responsible for handling the documentation on your advance payments?

A I was told by the agency that I was to work with Mr. Frederick Mathews, all of my documentation in reference to contracts or anything relating to the status of the company was supposed to go to Mr. Frederick Mathews.

Q During January and February of this year did you have occasion to talk to Mr. Mathews in his official capacity?

A Yes, I did.

Q How often?

A Several times. Probably twenty times, if not more.

Q A lot?

A A lot.

Q Do you recall whether you had a conversation with him on February 27th of this year?

A Yes.

Q Do you recall the circumstances under which that [201] conversation took place?

A I was trying to get him to send the documents to Chicago, and I told him, I said many times you get me promises, it is going this week, it is going next week, it is going this week, it is going next week. I said, I heard this throughout 1984. I says, my business is shut down and my employees are laid off. I said, I have not drawn a check from my company since October of last year. I am at the verge of losing everything. I said, why can't you send the documents to Chicago?

Q All right. Where did this conversation take place?

A I called him from my house because my phone at the business was shut off.

Q Did there come a time when you actually met with him on that day? If you recall?

A February?

Q U-huh.

A I don't recall meeting with him that date.

Q Do you recall a meeting with him late in February?

A I had meetings with him late in February.

Q Do you recall a meeting with him late in February that occurred at a restaurant?

A Yes, I do.

Q And do you recall what restaurant that was?

A It was at Coco's.

[202] Q Do you recall the time of day?

A It was in the afternoon.

Q What was the reason for that meeting?

A I was going to go along with him as far as his money requests, if he could assure me that this would solve my problems, to get the advance payments on my contract.

Q Did you discuss this topic?

A Yes, I did.

Q Now, on this particular day, Mr. DeShazer, were you letting the FBI know what you were doing?

A Yes, I was.

Q And did you report this conversation to the FBI after it occurred?

A Yes.

Q And in fact did you make a recording of this conversation?

A I did.

Q Have you had a chance to hear it since?

A Yes, I have.

Q How good a recording is it, sir?

A It was not a perfect recording, but I could remember the conversation, I identified the conversation.

Q The recording itself to a person that hadn't been there, how would it have sounded?

A Probably like a program in Russian.

[203] Q Mr. DeShazer, can you tell us about the conversation that you had with Mr. Mathews on that day?

A Yes. I told him that I had been doing some thinking, and that I think that I have made some mistakes. I said, you recall last year in February when you asked

me for the three thousand dollars, and I didn't give it to you? I says, now, actually, I could have given you the three thousand dollars, I could have raised the three thousand dollars but I didn't feel obligated to give it to you. And later on you asked me for the twelve hundred dollars and I didn't give it to you. I said, you remember that I said don't interrupt me while I am talking. Just let me finish. He said, yes. I said, then on several occasions one day you asked me, I don't remember how many times, let's just forget about that, let's just deal with the forty-two hundred dollars. He said yes. I said, now, Fred, you know I have been trying to get a second mortgage on my house, or an equity loan on my house. He said, I know. I said, you know I have not been able to get that loan. He says, yes. I says, well, there is a fellow in Chicago that is a friend of mine, that has agreed to give me an equity loan on my house, which is for seven thousand dollars—for twelve thousand dollars. I says, now my wife thinks I am only getting seven thousand dollars, so I have five [204] thousand dollars to work with. Now, here's what I want to do. First of all, I says, I think that forty-two hundred dollars is costing me over a hundred thousand bucks. Because, I said it is causing me a lot of serious problems. I says, now, with that five thousand dollars that I have, what I want to do, that three thousand dollars that you asked me for in 19—February of '84, and the twelve hundred dollars, I want to give you that forty-two hundred dollars, if you can assure me that this is going to solve my problems.

He says, sure, I am sure that I can do that. I says, well, how soon? I said, as soon as I call my fellow in Chicago and take, I have to take the information from my house there, he is going to give me the twelve thousand dollars. I said, if I can have your assurance that this is going to solve my problems, I will give you the forty-two hundred dollars.

He said, this will help out, this will solve the problem. I can do this, I can do that. And how soon will you

have the money? I said, I can have it tomorrow if I go to Chicago to get it.

Q Did he give you any kind of assurance about what you would have to do?

A He told me that he will make sure that everything is done properly, and that I can get some activity towards [205] my advance payments.

Q Now, Mr. DeShazer, you had more than one conversation with Mr. Mathews on this topic, did you not?

A Yes, I did.

Q And do you recall when you next met with Mr. Mathews to talk about this particular subject?

A The next time that I talked to Mr. Mathews, I think it was about two or three days after that, because after he learned that I could possibly get the money—

Q Let's just talk about the time frame here for a second, okey?

Was the next contact a telephone call, or a face to face meeting?

A The next contact was a face to face meeting, I think.

Q Where did that take place?

A That took place at the Hyatt, I think.

Q Do you recall when the next meeting took place?

A I don't recall the exact date.

Q When with relation to this first meeting?

A It was for lunch meeting, and I met Mr. Mathews and he was with another gentleman that day, so I was—the meeting was not, that was not extended, it was a very short meeting.

Q Who was the other gentleman, sir?

A I don't recall his name. I don't recall the other [206] gentleman's name. He was a minority guy, this is all I know.

Q What was the subject of the conversation on that occasion?

A On that occasion Mr. Mathews informed me that he had the letter of credit for my large contracts that

was awarded in September of 1984, and he showed me a copy of that letter.

Q Now, over the next several weeks, you had a number of meetings and telephone calls with Mr. Mathews, isn't that correct, extending into April?

A Yes.

Q And during these conversations did you discuss on a number of occasions the difficulty that your business was experiencing?

A Yes.

Q And the advance payments of so on and so forth?

A Yes.

Q Now, I would like to direct your attention to late April or—excuse me, early April of this year, specifically to April 8th of this year. You have that day in mind, sir?

A Yes.

Q Between the meeting at Coco's and that date, did you have any meetings with Mr. Mathews where you sat down [207] down face to face and talked about this forty two hundred dollars?

A Yes.

Q When did that occur?

A The last time that I talked to him about that was April the 8th, was the date that he was arrested.

Q Okey. Just so we get a little time frame here, sir, if I,—was that the last time on which you talked to Mr. Mathews about the subject, was the day of his arrest?

A The day of his arrest was the last day that I talked to him about it.

Q In between the day of his arrest and the discussion that we were just talking about in February, did you meet face to face with Mr. Mathews at any other time to talk about the forty-two hundred dollars?

A Yes, I did.

Q Now I would like to ask you, sir, where this conversation took place.

A In my car.

Q And how far, or how long was it before the date of Mr. Mathews' arrest?

A About five days, I think. A very short time before that.

Q I would like to ask you how that particular meeting came about, and who called who and so forth.

A I had had a meeting with Mr. Mathews for lunch, a short [208] period of time, and he showed me a letter of credit that they had received for me to do a government contract for one million forty-one thousand dollars, and I asked him at the meeting about a transfer voucher which is necessary to transfer those funds to my bank. He says, well, we would have to discuss that later today, and told me to call him back at two o'clock. And when I called him back at two o'clock he asked me to pick him up from work that afternoon, and we can talk about it.

Q Did you have a conversation with him in the car then?

A Yes, I did.

Q Now, did you make a recording of that conversation, sir?

A Yes.

Q And is there anything on that recording that might refresh your recollection with respect to what day it was that it took place?

A I really couldn't say exactly what day.

Q Did you indicate on the recording what day it was?

A I indicated on the recording the date that I met with him, yes.

Q Mr. DeShazer, with respect to that recording, I would like to just direct your attention to that day, whatever day that was, okey? That day that you met with Mr. Mathews in the car.

Before that day, did you receive, had you [209] received certain equipment from the FBI?

A Yes.

Q And what was the purpose of that equipment?

A The purpose of the equipment for me to record the conversations that I had at our meetings, and also I had a device that I used on my phone.

Q Let's just take the other thing first. What did it look like?

A It was a regular briefcase.

Q Could you open it up?

A Yes.

Q Were you able to open it up personally, yourself?

A Yes, I could.

Q Did it look like a briefcase on the inside as well as on the outside?

A Yes. I used it for my business purposes.

Q So you just carried it around with you?

A Yes.

Q And where was the recording device in the briefcase, if you know?

A It was hidden on the back part of the briefcase. You couldn't see it.

Q Now, before the date of this conversation, did anybody show you how to use this thing?

A Yes.

[210] Q Who did that?

A Agent Woodring.

Q Can you tell us what he did in showing you how to use this briefcase with the recorder init?

A Yes, he showed me how to work the off and on mechanism.

Q How did that work? Can you tell us about what that looked like and how that worked?

A Looked like the opening mechanism on a, just a regular briefcase. You slide it back for off and you slide it forward for recording.

Q What else did he tell you about the way that recorder worked?

A He told me that I could record either with the briefcase open or closed, and in an open area or automobile.

Q Did he tell you how to get access to the recorder device itself?

A No, he did not.

Q Do you know whether the recording device had anything on it that would permit you to back up the tape on that device?

A No.

Q You don't know or it didn't?

A I don't know.

Q Did anybody tell you how to do that with this device?

A No.

[211] Q Did you ever try and figure a way out to do that?

A No.

Q Now, Mr. DeShazer, you had used this device before the meeting that are talking about, right?

A Yes.

Q And that would be by just flicking the little on and off mechanism on the top of it before you wanted to start recording, is that right?

A That's correct.

Q And then when you were done you would flip it back off, right?

A Yes.

Q What did you do on the day when you were going to meet with Mr. DeShazer, the day that he wanted you to pick him up from work?

A I picked him up from work as he instructed me to pick him up at Major Goolsbys, and I parked there and waited for him to get off work. When I saw him approaching the car I put the machine into recording motion.

Q Did you say anything before he got into the car?

A No.

Q Did you say anything about the date or anything like that?

A I put the date on the machine.

Q At what point, at that point or earlier in the day? [212] A Earlier, about four-fifteen I put the date on the machine.

Q That was the same day?

A That was the same day.

Q And what time was it that you picked Mr. Mathews up at Major Goolsbys'?

A About four-twenty-five.

Q What did you say to Mr. Mathews?

A Mr. Mathews instructed me to take Fond du Lac Avenue. I was going to take him home. I took Fond du Lac Avenue north.

Q Where did you finally arrive?

A He had me to stop. It was just, I think it was about the 5800 block of Fond du Lac. Just before that we were talking small talk, and I asked him about the payment voucher.

Q Okey. Before you get into the conversation, just trying to figure out where you went, okey?

A Yes. Instructed me to pull over, I think it was about the 5800 block of Fond du Lac Avenue, and parked.

Q Did you do that?

A I did that.

Q Did you have a discussion at that time?

A I did.

Q Did there come a time when you left that particular [213] location when you were talking to Mr. Mathews?

A Yes.

Q Where did you go then?

A After I left that location I went home.

Q Did Mr. Mathews get out of the car at that location?

A He did.

Q Where was that? Where were you?

A It was a garage. And he said this guy was fixing his car. He was going to be driving his car down from Menomonee Falls, so he going to wait for his car.

Q Okey. So instead of taking Mr. Mathews home, you were taking him to the garage to pick up his car so he could get home, right?

A Yes.

Q Now, Mr. DeShazer, what was the weather like on this particular day? Do you remember?

A It was a pleasant day.

Q Do you recall whether there were any traffic on the road surrounding you as you were driving down Fond de Lac?

A Yes, it was.

Q And also while you were parked?

A Not while I was parked. That might, maybe one car. It was an off street, it was a side street.

Q Now, after you completed this conversation at what point did you turn off the machine?

[214] A I turned off the machine when Mr. Mathews got out of the car.

Q Did you give that tape to anybody at some point in time?

A I gave it to Agent Woodring the following day.

Q What form was it in? In other words, what did you give to Agent Woodring?

A I gave him the whole briefcase.

Q Could it have been longer than the next day before you gave the briefcase to Special Agent Woodring?

MR. KAUFMAN: Objection, leading.

MS. KEARNEY: I withdraw the question.

COURT: All right.

MS. KEARNEY

Q Do you recall specifically when it was that you gave the briefcase to Special Agent Woodring?

A I don't think it was the next day. I think we had some time, I don't think we got together that next

day. I think it was maybe two days. I don't think it was the next day.

Q I am not suggesting it was the next day, Mr. DeShazer, I just want you to think about it for a minute. Give us the best recollection that you can about when you gave the brief case back to Special Agent Woodring.

A To be very honest with you, I couldn't swear it was the next day, even though I think it was, but it could have [215] been the following day.

Q When you gave the briefcase back to Special Agent Woodring, what was in it?

A When I gave it back to him I had taken my personal belongings out. There was just the briefcase, because they wanted to use it for another purpose, so I had to turn it back in.

Q Between the time that you completed the conversation with Mr. Mathews and the time you gave the briefcase to Special Agent Woodring, what did yu do with the briefcase?

A It was in my office or at home.

Q During that time did you make any additional recordings?

A I didn't make any additional recordings after that particular recording in the car before I gave it to Agent Woodring.

Q Did you do anything else that involved use of the recording device in the briefcase between the time you finished that conversation and the time you gave it back to Special Agent Woodring?

A No.

Q Now, Mr. DeShazer, can you tell us what you and Mr. Mathews talked about on that occasion?

A We talked about the forty-two hundred dollars. I told him that I only wanted to give him half of what he [216] wanted because my phone was off, my landlord was on me about paying a one month's lease on my business. I said what I would like to do, just give you half of

it. He said okey. I said then in about two days, after I get the money from the bank, I can give you the balance.

Q What else did you talk about during that conversation, sir?

A Basically I was relating to him of my business situation, the critical situation that I was in, and I wanted him, I kept saying, are you going to, can you tell me once I do this, this nightmare that I have is over? And he told me that it would be.

Q Mr. DeShazer, did there come a time when you came here to this building to the FBI office and listened to a recording of that conversation?

A Yes.

Q And can you tell us whether the recording that you heard at that time corresponded to your recollection of what occurred when the conversation actually took place?

A Yes.

Q And from that time did you have access to a transcript of that conversation?

A I did.

Q Did you follow along as you listened to the tape recording when you read the transcript?

[217] A I did.

Q And what did you find with respect to whether the transcript corresponded to the conversation that you heard on the recording and on the day of the conversation took place?

A The transcript corresponded with the record on the day that it was recorded.

* * * *

[233] BY MS. KEARNEY:

Q Now, Mr. DeShazer, at the conclusion of the proceedings yesterday we heard a taperecording that you testified about before we started, do you recall that?

A Yes.

Q And is that in fact the taperecording that you made in [234] the car that you described for us prior to the time the tape was played?

A Yes, it was.

Q Now, sir, there were a couple of references in that taperecording that I would like to ask you about, just so that we are all on the same wave length here.

There was a reference to keeping something in a garage, do you recall that?

A Yes.

Q What was that about, sir?

A It was about some money that I had told Mr. Mathews that I had in the garage, that I would be in a position to use for the amount that he requested.

Q And is that the money that you told us about yesterday?

A Yes.

Q Okey. Then there is a reference a little later on in the conversation, "would a part of it do". Do you recall that part of the conversation?

A Yes.

Q A part of what, sir?

A A part of the forty-two hundred dollars that he had requested.

Q And just so there is no confusion, there was a reference to an eight thousand dollar figure. Do you recall that, sir?

[235] A Yes.

Q What was that eight thousand dollars.

A Eight thousand dollars represents the amount that I had requested from the North Milwaukee State Bank in the form of a direct loan to me. Business loan.

Q Does that have anything to do with the forty-two hundred dollars that you and Mr. Mathews were discussing?

A Yes.

Q What was the relationship between those two amounts?

A I told Mr. Mathews that before I would use the money that I had in the garage I would like to be assured that I had the loan from the North Milwaukee State Bank.

Q There are a couple of names that were mentioned and I would like to have you tell us who these people are in the scheme of things, if you could, please.

Who is Schmidt, a person referred to as Schmidt?

A Mr. Paul Schmidt is a revenue officer with the Internal Revenue Service.

Q And why would it be that you would be discussing Mr. Schmidt with Mr. Mathews?

A I had requested a payment plan for some delinquent taxes, and Mr. Schmidt was in the process of granting me that request.

Q And did that have anything to do with your 8A [236] contract, sir?

A Yes, it did.

Q What?

A I had been required to get a payment plan for the delinquent taxes before the advance payments could be released to our firm.

Q And who are Jerry and Ken that you referred to at one point, sir?

A Jerry is Gerald Henkins, who is president of North Milwaukee State Bank. Ken is Ken Little, the loan officer for the North Milwaukee State Bank.

Q And why would you have been discussing these two gentlemen with Mr. Mathews?

A Mr. Little and Mr. Henkins were involved in granting me the eight thousand dollar loan request that I had made to the North Milwaukee State Bank.

Q Now, I would like to direct your attention to April 23, 1985. Do you have that day in mind, sir?

A Not the exact date.

Q All right. Perhaps I can put the question to you a little differently.

Do you remember the day on which Mr. Mathews was arrested?

A Yes.

Q Do you recall whether you had any communication with him [237] the day before that day?

A Yes.

Q What kind of communication was this, a personal visit, a telephone call, or what?

A Mr. Mathews called my house.

Q What did you discuss during that telephone conversation?

A We discussed the payment of the one half of the forty-two hundred dollars that he had requested.

Q Did you make any arrangements at that time?

A Yes, I did.

Q And what arrangements were those?

A I made an arrangement to meet with Mr. Mathews that following day for lunch at the Pfister Hotel.

Q Did you make a recording of that particular conversation?

A Yes, I did.

Q What did you do with that recording after you made it?

A I turned it over to the FBI.

Q Do you recall the date on which you turned it over to the FBI?

A Yes, the following day.

Q Have you had an opportunity since the day of that conversation to listen to a taperecording of that conversation?

A Yes.

Q Where did that take place?

[238] A In the office of the FBI.

Q Who was present during that particlular visit to the FBI besides yourself?

A Special Agent Pruit.

Q And did the recording that you heard correspond to the conversation that you recalled having had on that day?

A It did.

Q During the time of your listening to this particular taperecording, did you have the transcript to aid you in listening to the recording, or did you follow along with the transcript?

A Yes, I did.

Q And can you tell us whether the transcript corresponded to the taperecording that you heard?

A Yes, it did.

MS. KEARNEY: Your Honor, at this time I would ask that Special Agent Pruit play for the jury Exhibit 3.

COURT: All right.

MR. KAUFMAN: Your Honor, I would make a request and that would be the rule of the completeness, that the entire tape be played.

MS. KEARNEY: I have no objection.

MR. KAUFMAN: Beginning at the telephone conversation to the end of the telephone conversation.

MS. KEARNEY: I should indicate, though, that I [239] prepared a jury transcripts only for a portion of the conversation and it might actually be less confusing if we just eliminated the transcripts.

MR. KAUFMAN: That's fine.

COURT: All right. The preparation of the transcripts is only a few pages?

MS. KEARNEY: Your Honor, we have been prepared to go to the point in the conversation where the transcripts started, namely Exhibit 4, and it may take Special Agent Pruit just a moment to find where on the tape the conversation begins, if you will bear with us just for a minute.

COURT: All right.

(Tape played for Jury)

MS. KEARNEY

Q Now, Mr. DeShazer, did you in fact meet with Mr. Mathews as you had arranged?

A Yes, I did.

Q Where did you meet him?

A I met him at his office the next morning, around nine-thirty.

Q What was the purpose of that particular meeting? What did you do then?

[240] A I had to take some documents over and give it to him in the relation to a transfer of government funds on a government contract.

Q And did there come a time later on that day when you met him other than in his office?

A Yes.

Q Where did that meeting take place?

A The Pfister Hotel.

Q What time did you arrive at the Pfister?

A About twenty-five minutes to two.

Q And before you got to the Pfister, had you been somewhere else?

A Yes, I had.

Q Where is that, sir?

A I had had a meeting with Mr. Paul Schmidt of the Internal Revenue Service at the Federal Building.

Q Pertaining to what?

A Pertaining to the payment plan on some delinquent taxes.

Q That's that payment plan that you referred to a few moments ago?

A Yes.

Q After you met with Mr. Schmidt did you meet with anyone else at the Federal Building?

A Yes, I did.

Q Who?

[241] A Members of the FBI.

Q At that time what did you talk about?

A I told Agent Pruit that I was going to call my office to see if I had any messages and that is what I did.

Q What was the purpose of the meeting with Agent Pruit at that time?

A Because I had a prearranged meeting with Mr. Fred Mathews.

Q And when you went to this meeting with Special Agent Pruit, did you have the special briefcase with you that had the recorder in it?

A Yes, I did.

Q Did you talk about that recorder when you were meeting with Special Agent Pruit?

A Yes.

Q What was that discussion? Tell us about that, please.

A First of all, I had the briefcase and I was, had a special wiring mechanism that was on my person, and we checked it to make sure that it was still operating.

Q By "special wiring mechanism", what did you mean? What did it look like and what was it supposed to do?

A It was a little small gadget that I had on the inside of my left shirt pocket.

Q And if you were wearing that, what would happen?

A It would record the voices of anyone that I was talking [242] to. Either by phone or in person.

Q While you were talking to Special Agent Pruit, did he give you anything?

A No, he did not.

Q After your meeting with Special Agent Pruit, did you go right over to the Pfister?

A Yes. I was in the Pfister when I was meeting with Mr. Pruit.

Q Okey. And where in the Pfister did that take place?

A It was in the lobby area.

Q Just so we get this straight, did you meet with somebody from the FBI while you were still here in this building after meeting with Mr. Schmidt?

A Yes.

Q Okey. And then later on you talked to Special Agent Pruit over at the Pfister, is that correct?

A That's correct.

Q And then after you talked to Special Agent Pruit in the lobby, then where did you go?

A I went into the diner, the Greenery, it is called, in the Pfister.

Q Where did you sit?

A In the front area near the cash register, about four seats east of the cash register.

Q Are there booths or tables, or what?

[243] A They are booths.

Q Did you have a brief case with you at that time?

A Yes, I did.

Q Did you have a special, did you have the special device that you were talking about before also on your person?

A I did.

Q Did you—what did you do, was there anyone there when you went into the Greenery?

A I was alone.

Q How long were you alone?

A About twenty-five minutes.

Q And then did someone come in to you?

A Yes.

Q Who was that?

A Mr. Mathews.

Q Did he sit down with you?

A Yes, he did.

Q Did you then have a conversation?

A I did.

Q With Mr. Mathews?

A Yes.

Q How long did that conversation last, approximately, if you recall?

A About fifteen to twenty minutes.

Q Did there come a time during the course of your [244] conversation where you gave something to Mr. Mathews?

A Yes.

Q And what was the something that you gave to Mr. Mathews?

A It was a white envelope with twenty-one hundred dollars.

Q Where had you obtained that white envelope?

A From the office of the FBI.

Q Did someone there give it to you?

A Yes.

Q I would like to show you what has been marked Government's Exhibit 9, and ask you whether that is similar to the envelope that you handed to Mr. Mathews?

A It is.

Q Now, at the time you handed that envelope to Mr. Mathews, had you seen what was inside?

A No, I didn't.

Q Was it sealed when you received it then from the FBI?

A Yes, it was.

Q Can you tell us about the part of the conversation that you had with Mr. Mathews in which you gave him this envelope? Can you describe to us what happened at the time of that transfer?

A Yes. Mr. Mathews was in quite a hury, and asked me to sit because I want to talk to him before I gave him the money, I wanted to talk to him. And I asked him if [245] he was aware of the fact that—no, I asked him if his supervisor, Mr. Bob Henderson, was aware that I had not drawn a pay check from my company since October of '84. He says, yes. And I asked him, I think it was Mr. Miller, I think it was aware that I had not drawn a pay check from my company since October of last year, and he said yes. I asked him if he was aware that my wife had not drawn a pay check from the company since last October? He said yes. And

then I says, you aware that my car had been repossessed and I have to come up with $1500.00 by May or otherwise they are going to auction it off? He said yes. And I was asking him if everyone was aware of my personal and business serious financial situations.

Q Now, sir, at that time where was this envelope?

A The envelope was in the briefcase.

Q At what point did you open the briefcase or was it already open?

A No, it was not already opened. I opened the briefcase when Mr. Mathews asked me if I had the money with.

Q And then what did you do with the envelope after you took it out of the briefcase?

A First I just let it lay there for a while, and then I wanted to clarify something else, or get an understanding from Mr. Mathews before I gave him the [246] money.

Q What was that understanding, sir?

A That once I gave him the money the problems that I had experienced in the past, the times that he told me that the financing was coming over a period of eight months would never happen again. Any future statements that he made to me or information that he gave to me would be the type of information that I could rely on to the fact that I could take it to my bank or that I could bank on it.

Q What has been your experience in the past with respect to the information that you had received of that kind from Mr. Mathews? Was it bankable information?

A No, it was not.

Q After this part of the conversation, what did you do with the envelope?

A After his assurances, I gave him, I put the envelope on my leg.

Q Under the table?

A Under the table.

Q Then what happened?

A I told him he could get it if he wanted it.

Q What did he do?

A He picked it up.

Q Was there anything that happened between the time you [247] put it on your leg and the time you actually picked it up?

A Well, actually he was in kind of a hurry to get it, so it fell off on the floor, and he picked it up off of the floor.

Q What happened after he picked up the envelope?

A After he picked up the envelope is when I told him that we should not go out together, something to that effect, and that I didn't want it to look suspicious.

Q Was this the end of the conversation then, basically?

A Basically, yes, that as, I told him I would talk to him later.

Q Did there come a time when you left the Greenery?

A Yes.

Q How long after you gave Mr. Mathews the money did you leave the Greenery?

A Approximately—

Q Approximately.

A Ten minutes, approximately.

Q How long after you gave Mr. Mathews the money did he leave the Greenery?

A He left immediately.

MS. KEARNEY: At this time, your Honor, I would ask that Special Agent Pruit be permitted to play Exhibit 5, and that consists of the tape in its entirety. [248] I do have transcripts of Exhibit 5 which are marked Exhibit 6, that I would like to give to the jury with the Court's permission.

COURT: All right.

MR. KAUFMAN: No objection.

(Tape played for the Jury)

MS. KEARNEY

Q Mr. DeShazer, is that the recording of the conversation that you just described for us that you had with the Pfister on the day of Mr. Mathews' arrest?

A Yes, it was the tape.

Q And was the date that you stated at the beginning of that tape the correct date of that event?

A That is the correct date, yes.

Q So that it would be April 24, 1985?

A That is correct, April 24th.

Q Now, about half way through that conversation, a little better than half, Mr. Mathews asked you, "you still got that letter?" And you said, "yes". Meaning the one from home. What was your understanding of what that was all about?

A The letter was the letter that I picked up from Mr. Schmidt from the IRS.

[249] Q And that led to your discussions about Mr. Henderson's knowledge of your personal problems, is that right?

A Yes.

Q Now toward the end of this conversation you said, "oops". What happened here?

A That's when the envelope fell off of my leg on the floor.

Q Now, Mr. DeShazer, I have just a couple other questions for you. One I wanted to clarify something that I forgot to ask you yesterday before these conversations that we have just heard back in late November and December of 1984, do you recall that time frame?

A Yes.

Q After you wrote Mr. Mathews the letter that has been received as Exhibit, I believe thirteen, can you tell us whether Mr. Mathews ever did give you any money back?

A Yes, he did.

Q Would you tell us how much and when that occurred?

A He gave me two hundred dollars. This was approximately, I think it was in January. I don't recall the exact date, but I know it was on a Saturday.

Q Of this year?

A Yes.

Q And have you ever received any additional amounts back from Mr. Mathews?

A No, I did not.

[250] Q Mr. DeShazer, on April 24th of this year, what was the status of the advance payments that you had been discussing with Mr. Mathews?

A The funds had not been released to me at that time.

Q And how many contracts at that time had you made requests for advance payments?

A At that time we had made requests on advance payments for advance payments on two contracts.

Q Which ones were those?

A It was a navy contract that was awarded January 26th of 1984, for two hundred and thirty thousand dollars. And it was for a contract that was awarded September 30th of 1984 for one million two hundred and fifty-five thousand eight hundred dollars.

Q What was that first contract for, and what were you going to make?

A We were going to make a hundred and twenty thousand navy watch caps for the navy.

Q And what were you going to make for the navy on the second contract, the big one?

A The second contract was an army contract, and it was for four hundred and sixty thousand of an item called a winterization kit, which is a cover for a gas mask.

Q And where there are references to winterization kit on the tapes that we just heard, is that what you are [251] talking about there?

A Yes, it was.

Q And how much of the total advance payments were you expecting for those two contracts?

A The winterization kit it was seven hundred and eighty-five thousand dollars, and on the navy contract, originally we had requested two hundred and nine thousand, but it was adjusted down to ninety thousand dollars.

Q When did you first ask to have these advance payments considered on those contracts?

MR. KAUFMAN: Which ones?

MS. KEARNEY: First of all.

MR. KAUFMAN: Clarification.

MS. KEARNEY: Fine.

MS. KEARNEY

Q On the watch caps contract, the first one you described when did you first make a request to have advance payments on that contract?

A The request was made in December of 1983.

Q And when did you first request advance payments on the second contract, the one for the winterization kits?

A It was made in August of 1984.

Q Now, with respect to the advance payments for the contract involving the caps, were you supposed to [252] submit certain items to Mr. Mathews to have that request processed?

A Yes, I was.

Q Did you in fact do so?

A I did.

Q When did you submit documents in response to that?

A In December of 1983.

Q And yesterday we discussed a little bit your expectations for receiving an advance in February of 1984. Is this the advance that we are talking about?

A That is correct.

Q Did there come a time when you associated the requests for money that Mr. Mathews had made from

you and those advance payments that you did not receive them?

A Yes.

Q At what point in time did you come to associate those two things, sir?

A The first time was in February of 1984. The second time was in July of 1984.

Q Can you tell us what happened in February, what event it was in February that made you put those two things together in your mind?

A First of all, in February when Mr. Mathews asked me for three thousand dollars and had not paid back the money that I had loaned to him, it didn't sound right. [253] In July of 1984, after many telephone calls from Mr. Mathews and to him, I talked to him in July because I was very frustrated, and I asked him the amount of the check that was supposed to be floating around.

Q Check for what, just so we are clear.

A For the navy watch caps, the advance payment.

Q What did he tell you in response to your question?

A Mr. Mathews, when I asked him, "Fred, how much is the check for?" He said, "About a hundred and fifty thousand dollars". And then I let him complete his statement, and when he completed that statement I says, "Fred, you know what you just did?" He says, "What do you mean?" I said, "You just scared the hell out of me".

Q Why was that?

A He asked the same question. I said, "The reason why is, the way you just answered my question, you have not submitted the documents for the advance payment".

Q Why did you say that, Mr. DeShazer?

A Because, if he would have submitted the documents, the fact that he is the one that submits the amount, he would have known the amount of the check.

Q Now, what was it about this event that made you associate it with the request that he had made for money from you?

[254] A First of all he had assured me that the documents had been submitted. He even told me that he had talked to Carl Hauser, who is the man that is responsible for issuing these checks. He had talked to Carl Hauser in June, and asked him if he would give me a telex copy of the check showing the amount of the check. And Mr. Mathews had agreed to go with me to my bank the following day to take this information to my bank. And when I talked to him in July, 1984, and based on information that he gave me, I knew that what he told me in June was not true because there was no check to verify because the documents that was required to make that check a reality was still in his drawer. That is when I put the two and two together.

MS. KEARNEY: I have no further questions of Mr. DeShazer.

COURT: All right, you may cross-examine counsel.

CROSS-EXAMINATION

BY MR. KAUFMAN:

Q Mr. DeShazer, lets just stick with the fact that you were just testifying to before.

You put two and two togther back, you say, in [255] June of 1984; that you believed that the advance payments were somehow tied to Mr. Mathews' request for money that you talked about, right?

A That's correct.

Q And what you thought then that was that Mr. Mathews was not going to,—was going to tell you he was not going to do anything until he gets the money, right?

A That's correct.

Q But what Mr. Mathews had told you was that he had done everything, right?

A He told me that, sure.

Q So you assumed that Mr. Mathews was lying to you and expected you to see through that lie and realize that he was holding you up for money?

A That is the way I took it.

Q Right. Okey. And that is how you took it the first time too, right? Back in February of '84?

A That's the reason I didn't give him the money.

Q Okey. Now, you said you were expecting some advance payment in February of 1984, is that right?

A No, I didn't say that.

Q All right. You were talking about a navy watch cap contract, right?

A That is correct.

Q Now, you had two of those, didn't you?

[256] A Sure did.

Q And you had one back in 1983?

A That's correct.

Q And that wasn't completed, was it?

A No, it was not.

Q And you got another one in 1984, right?

A Correct.

Q And you requested advance payments on that contract, right?

A That was the only one I requested advance payments for at that time.

Q You hadn't completed that first navy watch cap contract, had you?

A No, I had not.

Q So the second navy watch cap contract, or you had requested advance payments on, was in February of 1984?

A I had requested advance payment in December of '83.

Q On the contract that began in February of '84?

A On the one that was awarded in January of '84.

Q Okey. But you put this, as you said before, you put this failure of yourself to receive the advance payments together with Mr. Mathews' request for money, right?

A That's correct.

Q And that was in February of 1984, right?

A I didn't make the decision in February of '84, I had the [257] suspicion in February of '84.

Q Because what, you didn't receive your advance payments in February of '84?

A No, because he asked for more money and hadn't paid me the original money.

Q But at that time then it wasn't tied to any advance payments then, right?

A Sure.

Q Well, what advance payments?

A The advance payments for the navy watch cap that was awarded to me in January of '84.

Q When were those advance payments to be paid?

A Based on the information that Mr. Mathews gave me, approximately thirty days.

Q From when?

A From the day I submitted the documents in February of '84, to the time he sent them to Chicago.

Q So that would be what, March, April, of '84?

A Two months after February, whatever that time to add up to.

Q You made a number of statements to people from the Department of Navy about Mr. Mathews, correct?

A That is correct.

Q People from the FBI?

A That's correct.

[258] A number of agents from the FBI as a matter of fact, right?

A Well, four at the most.

Q Okey. Ms. Kearney?

A Yes.

Q Mr. Pruit?

A Yes.

Q And have you reviewed any of those statements, any written documentation of those statements that you made?

A I reviewed the recordings.

Q Did you look at any written documents that were records of your statements to say the FBI agents?

A I didn't have to—no, I didn't.

Q You didn't look at any of those?

A No.

Q You wouldn't have looked at any of the written documents generated by the people from the navy in response to your statements?

A No, I have not.

Q But you listened to the tapes and read along with the transcripts on a number of occasions?

A Yes.

Q So when you testified to the conversations that are contained on tape, those of course would, your testimony would be based upon not only having the conversation, but [259] then listening to the tapes of those conversations a number of times subsequent, right?

A That is correct.

Q All right. So you think your memory of what happened in those conversations would probably be a little bit better than the memory of the ones you have had a chance to review tapes of, right? Or would it be the same?

A Ask that question a little bit slower and I can probably answer it for you.

Q Okey. If you had reviewed tapes of conversations that you had when you weren't taped, you know if there were tapes, okey, of these conversations that you talked about back in 1984 and 1983, then you would have a better memory of what was said, right?

A If they were taped, but they weren't.

Q Right. But you would have a better memory then, if they were taped?

A I can't say that, truthfully.

Q You can't?

A No.

Q You think you remember pretty well anyway, without listening to the tapes of them?

A Sure.

Q Lets go to the ones that were taped. You testified before you listened to this last tape of the con- [260] versation in the Pfister, you testified that basically what the conversation was about, right?

A That is correct.

Q And that you testified that you had said that during that conversation that your wife hadn't drawn a paycheck and you hadn't drawn a paycheck, and all those things, right?

A All those things, correct.

Q But you didn't say anything in that conversation about your wife not drawking a paycheck, did you?

A That last one you musn't have listened right, because it was in there.

Q It was?

A Sure it was.

Q You said that your wife hadn't drawn a paycheck?

A That's correct.

Q You said that you wanted to leave apart because you didn't want anything to look suspicious, correct?

A That's correct.

Q You didn't say that in the tape, did you?

A It was in the tape.

Q But you didn't want to leave together because it would look suspicious?

A I heard it.

Q Well, you remember the conversation then so you can tell [261] me about some of the things that you said?

Now, you discussed things that Mr. Henderson was going to do, right?

A Was going to do?

Q Yes.

A I didn't say anything about what he was going to do.

Q Well, did Mr. Mathews say anything about what Mr. Henderson was going to do?

A He might have.

Q You don't remember that?

A Not particularly, no.

Q You didn't talk about requests which Mr. Henderson had made to Mr. Mathews, you remember that?

A In reference to the document from the IRS? I remember that.

Q Right. You remember Mr. Mathews telling you that Mr. Henderson wanted some information on the processing of your bank loans?

A Sure.

Q Then you asked him, you asked Mr. Mathews that with this letter from IRS, that you were going to give Fred at that meeting, what Henderson would do now that he got that letter, right?

A That is correct.

Q You understood that Mr. Henderson was the one that was [262] administering your affairs with the SBA, didn't you?

A He was involved. I don't know if he was administering it or not.

Q You talk to Mr. Mathews told you some things about what he was going to give to Bob Miller and things that he was going to try to get Bob Miller to do for you, right?

A Yes.

Q When you talked about your problems you made it in the terms of is Henderson aware of all these things, right?

A That's correct.

Q Because Henderson was the one that was holding, was in the position of power over your affairs with the SBA, wasn't he?

A I don't know what power he had. He was Fred's supervisor, that is all I was concerned about.

Q Talked about a new statement for some advance payment. What was that about?

A Talked about what?

Q Some new statements for some advance payments.

A That was for a new contract.

Q Which contract was that?

A The contract for an item called a small arms case that was awarded to me in February of this year, '85.

Q Now, I want to go right near the end of the conversation, you were walking out and you said [263] something about I would like to preach him a little something. You remember saying that?

A It wasn't, that is not what I said.

Q You didn't say, "I would like to preach him a little something"?

A No, I didn't say that.

Q Well, you testified earlier that you have read the transcripts of these conversations and they accurately reflect the conversation that you had, didn't you just testify to that?

A I sure did.

Q And does the transcript say that you said, "I would like to preach him a little something"?

A The transcript didn't say that. The tape didn't say that.

Q But the transcript did, right?

A I didn't do the transcript.

Q I know, but you said that you reviewed it and that it accurately reflected what the tape said, didn't you say that?

A It did reflect it. But that statement was not, "I would like to preach him a little something", that statement was, "Its enough to make me start preaching

again", is what I said in that tape, because I am an ordained minister. That is why I made that statement.
[264] Q Enough to make you start preaching again?
A That's what I said. Now you got it.
Q You said that to Fred?
A That is what I said.
Q You said that to Mr. Mathews?
A I said it.
Q You didn't say it to Mr. Mathews?
A That's who I was talking to, sure.
Q Isn't it a fact, Mr. DeShazer, that you could talk into that mike without Mr. Mathews hearing, and you said, "I would like to preach him a little something", when you were walking out?
A Sure, I could have said that, sure. I could have done that.
Q When you are having these conversations you were able to say things without Mr. Mathews hearing them, and then it would show up on those tapes, right?
A Well, it was on the phone. That all depends on what kind of tape you are talking about.
Q Talking about the tapes where you had a receiver with you, or in your briefcase.
A No.
Q Oh, you couldn't do that?
A No. I could, but he would listen to it. He was sitting right in front of me.
[265] Q You were sitting at a table when all this happened?
A That's correct.
Q Well, now I am confused. Earlier in the tape Mr. Mathews says, "Why don't we go out here, let's go out here", you remember that?
A Sure do.
Q Where did you go?
A We didn't go any place.
Q You just stayed there?
A That is correct.

Q You were still sitting at the table?

A That is correct.

Q All right. Now, you also said something to Mr. Mathews about, "I told you I had a date last night". Do you remember that?

A I told you I had a date last night? I didn't tell him I had no date last night.

Q You didn't tell him that?

A No.

Q Well, you listened to the tape and you didn't say that?

A I don't recall making that statement. Not in those terms. Might have said I had an appointment, I had a meeting last night. It was no date. To that effect. I don't have no dates unless it is with my wife.

Q So again you read these transcripts, and they are not [266] correct, is that right?

MS. KEARNEY: Objection, your Honor, that mischaracterizes the testimony.

COURT: Well, it is cross-examination.

Does that accurately reflect your statement or not, sir?

A Yes.

MR. KAUFMAN

Q You did say I had a date last night?

A It might have been something to that effect.

Q You said, "I don't want to wind up with another divorce case, you know", right after you said, "I had a date last night". And then you go on and you say, "My wife is getting very pissed about it".

What were you talking about?

A The fact that I was not bringing any money home.

Q You had a date last night and you don't want to wind up with another divorce and your wife is getting very pissed, and that' talking about the fact that you are not bringing any money home?

A Sure wasn't talking about that I had a date with another woman.

Q All right. Later on then in that conversation, you say that, "I was going to wind up—", you said that you had gone home and got it after you talked to Fred, and [267] because if you were going to keep it around there you knew what you were going to do, you were going to wind up spending it. What were you talking about?

A I was talking about the money that I had told Mr. Mathews that I had in the garage.

Q Okey. All right. Now lets go up to that last conversation before you met Mr. Mathews at the Pfister that day. How many times did you talk to him?

A I talked to Mr. Mathews approximately three times.

Q And those were all telephone conversations?

A No.

Q Talked to him personally one time at the SBA office that morning, right?

A That is correct.

Q Did Mr. Mathews call you that morning?

A He did.

Q He did? And where were you?

A I was at work.

Q And that is where you had that taperecorder on your telephone, right?

A Yes.

Q Just didn't turn it on that time?

A It wasn't on.

Q I see. You went to the SBA and Mr. Mathews told you that he would call you later. Now this is on the day [268] that he was arrested, right?

A Yes.

Q He never called you, did he?

A He called my office, yes.

Q Did you ask him to meet you at a tavern that day?

A It was discussed that possibility, yes.

Q What was the name of that tavern?

A Called Ben's Inn.

Q He didn't meet you at Ben's Inn, did he?

A No.

Q You called Mr.,—after you had been to the SBA you called Mr. Mathews, didn't you?

A Yes, I did.

Q And Mr. Mathews again told you that he would call you later, right?

A He did.

Q You didn't meet Mr. Mathews for lunch, did you?

A It was a late lunch.

Q You didn't meet him for lunch, right?

A We didn't meet at eleven-thirty like he thought he would be able to.

Q Then after he told you he would call you back, after you had been to the SBA office and called him once, he told you he would call you back. He didn't call you back again, did he?

[269] A Not before I left for lunch.

Q So then you called him again, right?

A I called him again, yes.

Q Then he didn't return that call, right?

A That is not correct.

Q Well, you say he returned the call and just left a message at your office?

A No, it was not a return call. When I had left the—when I left the internal revenue agent's office, I called my office to see if I had any messages, and my wife informed me that Mr. Mathews had called either two or three times to try and see where I was having lunch, and I returned his call.

Q Mr. Mathews wanted to meet you for lunch?

A He wanted to meet me for lunch.

Q You sure of that?

A That's what he said.

Q You recall that specifically?

A Very.

Q The last time that you called Mr. Mathews that day before he met you at the Pfister, you called him

and told him that you had been to see Paul Schmidt, right?

A That is correct.

Q And when you went to see Paul Schmidt, you obtained that letter from the IRS, didn't you?

[270] A Sure did.

Q And you told him you wanted to give him that letter, didn't you?

A That was one of the things we talked about.

Q What else did you talk about?

A I told him I was at the Pfister, that I was going to have a lunch, and that if he still wanted what he had asked for, I was going to be there. If he wanted it he could come and pick it up. He asked me where was I, and I told him in the Greenery. He says, "Fine, I will be there in ten minutes".

Q You aso told him that you had that IRS document that he had asked for, right?

A I told him that, yes.

Q He showed up there and said. "I can't stay long", right?

A He said that he was in a hurry.

Q He also said, first order of business that he brought up, was "You have that letter with you, right?"

A Something to that effect. It was mentioned in the early part of the conversation.

Q And you said, "Yes", then you gave him the IRS letter, right?

A That is correct.

Q Then you later made the transfer of the envelope, right?

[271] A Yes.

Q After you gave him the envelope, he didn't open it or anything, did he?

A No.

Q He even said at the end of the conversation, "We can go out together", right?

A Who said?

Q Fred.

A I think he did say that, yes.

Q You recall that?

A Yes.

Q Now, I want to go back then to the conversation the night before. Was the conversation on the telephone call that you say was from Mr. Mathews to you, is that right?

A Yes.

Q And that telephone was to you at home?

A That is correct.

Q Didn't you tell Mr. Mathews that your phone was off at home?

A No.

Q Okey. So you had the taperecorder at home?

A Yes.

Q Did you have the taperecorder on your phone at the office too?

[272] A No, the phone at the office was cut off.

Q The phone at the office was cut off?

A That is correct.

Q So you only had one taperecorder and you only had one phone?

A At that time.

Q Right.

A At that time, yes.

Q That was the one at home?

A Yes.

Q Now, that call the night from Mr. Mathews, you described the purpose of that call as he called you to discuss payment of the forty-two hundred dollars, right?

A That was discussed, yes.

Q But he didn't call you to discuss that, did he?

A I can't say why he called me.

Q You can't?

A No. I only—

Q You remember the conversation?

A Yes.

Q You read the transcripts?

A Yes.

Q Listened to the tapes?

A Yes.

Q What did he discuss with you when he called?

[273] A He discussed a cancellation of a meeting that we had planned.

Q All right. And then you discussed that and he told you that there was a meeting that was off, and nobody could get ahold of you during the day, right?

A That was not true. I had met with him that same day.

Q But after he learned that the meeting was going to be off the next day he couldn't get ahold of you, could he?

A That is not true. He could have got ahold of me.

Q Well, did he say that he couldn't get ahold of you?

A He said, yes.

Q So then he called you later that night?

A At home.

Q Told you the meeting was off?

A Yes.

Q All right. And then it was, it would have been a real short conversationk, told you the meeting was off and he says, well, I will see you in the morning then, right?

A That is what he said.

Q And then he said, well, I will see you tomorrow anyway?

A Yes.

Q And then you brought up "You ain't said nothing to me in the last week on this other thing off", right?

A That's correct.

Q So you are the one that brought up this payment to Mr. [274] Mathews, aren't you?

A This particular time, I did.

Q So when you characterize the phone calls always Mr. Mathews called you to discuss the money, you were mistaken, right?

A No. But only

Q You know what he was thinking, right?

A I know what he was thinking.

Q Okey. This was April 23rd that this telephone conversation took place, right?

A That is correct.

Q And the conversation that you and Mr. Mathews had in the car, that was the first tape we heard, was what date?

A I don't remember the exact date.

Q It was how far before this April 23rd conversation was it? A week? Two weeks?

A Could have been two weeks.

Q So nothing had happened in that two weeks, had it?

A Oh, a lot had happened in that two weeks.

Q I mean between you and Mr. Mathews regarding this money.

A That's what I'm talking about, too.

Q Oh, a lot had happened?

A Yes, we had talked about it more times, many times.

Q Over the telephone?

A Telephone, personal visits.

[275] Q At the SBA office?

A Yes.

Q Personal visits, what do you mean, personal visits?

A When I say, I mean person to person.

Q Okey. Social visits of any type?

A No social visits. Unless you want to call a lunch a social visit.

Q You had hung up a couple times?

A Oh, yes.

Q But none of those conversations, those many conversations, where you discussed those, those were not taped, were they?

A Some of those conversations were on the tape-recorder, some of those tapes not necessarily the last one, some of the tapes.

Q They were all taped and you discussed payment of that money?

A Yes.

Q You listened to those tapes and you could hear those discussions?

A Yes.

Q Well, that was within the last week before this discussion on the telephone on the 23rd?

A Happened over a two week to three week period, yes.

Q But it was continuous, right up until the 23rd?

[276] A Not continuous, but regularly.

Q Well, according to your own statement he hadn't said anything to you in the last week, right?

A Well, I was talking to him on the Tuesday, so that wasn't that far back.

Q You said there aren't going to be nothing there for you to get. Ain't going to be nothing there for you to get. What did that mean?

A That meant that I would probably spend it myself.

Q You said "The devil tempts me, you know what I mean"? Is that the same thing, you thought you might spend it yourself?

A Sure.

Q Later on in that conversation, Mr. Mathews talked, that telephone conversation, Mr. Mathews talks about some things that you got to get together for your business, right?

A That is correct.

Q A feasibility study by Mitchel Watkins?

A It was not a feasibility study.

Q It wasn't a feasibility study?

A It is not what they were going to do.

Q But he called it a feasibility study, right?

A He might have.

Q He said, "What good that will do you, you can take that [277] to these people that are, that want, you want want to convince that you can go ahead with these contracts, right?

A Yes.

Q People in the SBA like Mr. Henderson?

A Yes.

Q And Mr. Gordon?

A Yes.

Q And you know Mr. Gordon?

A I know him.

Q Mr. Cameron?

A Cameron.

Q And Mr. Miller?

A Yes.

Q Mr. Charter?

A I know Mr. Charter.

Q You knew all those people, didn't you?

A I knew all those people.

Q You knew those were the people that were at that time the ones that were saying that they shouldn't be giving you those advance payments?

A At that time they were the ones, yes.

Q You learned subsequently, have you not, the SBA doesn't allow payment of an advance payment until prior contracts have been completed, haven't you?

[278] A That's not correct.

Q That is not correct?

A That is not correct.

Q You know better than Mr. Miller or the people from the SBA?

A I know I received an advance payment about two weeks—about two months ago, and that same problem existed then, so that is the reason I say they make exceptions.

Q They make exceptions and two months ago they made an exception for you, didn't they?

A Yes, approximately.

Q That was about in June?

A Yes, approximately.

Q You had a telephone conversation before that April 23rd meeting, you had your phone, taperecorder on your phone, right?

A Yes.

Q You recorded a number of conversations?

A That is correct.

Q And you say that all of those conversations that you had on the phone with Mr. Mathews involved discussions of this payment of money to Mr. Mathews? Right?

A That is correct.

Q All right. Let's go to the meeting in the car, you recall that meeting?

[279] A Very well.

Q And you say that meeting was set up, Mr. Mathews called you and told you he wanted you to take him home, right? He wanted to have a meeting with you?

A That's correct.

Q Take him home?

A That's correct.

Q He is the one that requested that meeting, right?

A That is not the way it started out.

Q Oh, he didn't request that meeting?

A He requested it, but that is not the way the original request was made.

Q Wasn't that what you said yesterday?

A That was the request that he made last. Originally he wanted me to come down and meet him. He wanted to meet me after work. I told him that I was preoccupied, I made a prearrangement for an after work meeting. That is when he suggested that I pick him up from work and take him home, and we could discuss it in the car.

Q He said he wanted to meet you after work, and you said you couldn't, right?

A That is correct.

Q Because you were preoccupied?

A That's correct.

Q Had something to do after work?

[280] A Yes.

Q So then he said, "Okey, well, then pick me up after work and take me home", and that was okey?

A That was fine with me.

Q Okey. Well, this discussion in the car when he asked you to pick him up, that would have been on a telephone conversation?

A It was on a telephone conversation, yes.

Q And the tapeplayer was running then?

A No, the tapeplayer wasn't running then.

Q Why not?

A I really can't answer that. I don't really know.

Q Let's go to your running of these tapes. You were instructed some time in February by the FBI as to how to record these conversations, right?

A He told me how to work the machine.

Q How to work the machine?

A Yes.

Q And they told you that whenever you talked to Mr. Mathews, turn those on?

A That is correct.

Q Okey. And they instructed you in detail as to how to make sure that those taperecordings got good recordings, and that type of thing, right?

A That is correct.

[281] Q How to turn the thing off, turn it on, how to put it in the right position for a good recording?

A That is correct.

Q And you listened closely to these instructions, and you tried to follow them?

A That's correct.

Q And they also instructed you that you had received, after you had gotten some conversations on tape, then to bring you those tapes, bring them those tapes at their office, right?

A That's not correct.

Q No?

A No.

Q What did they tell you about how they were going to get the tapes?

A They came to my home. I didn't know how to work the machine on the attache case, so they came to my home and took the tapes.

Q Yesterday when you were questioned by Ms. Kearney, she asked you if you knew how to work those machines, you said "Yes", is that right?

A I knew how to work the machine, that's still correct. With the exception of removing the tapes, that I could not do.

Q Oh, so they had to come and help you remove the tapes?

[282] A They didn't help me, they just did it.

COURT: Counsel, would this be an appropriate time to take about a fifteen minute recess?

MR. KAUFMAN: I would love it.

COURT: All right. We will give the reporter a rest, take about a ten minute recess.

(Recess)

(Court reconvened—Jury present)

COURT: Mr. DeShazer, would you come back to the witness chair again?

MR. JAMES DE SHAZER after first having been duly sworn upon his oath, testified as follows, to-wit:

BY MR. KAUFMAN:

Q Mr. DeShazer, I guess we were talking about the telephone conversation that led to you meeting Mr. Mathews in your car. You got that in mind?

[283] A Yes.

Q That telephone conversation you said that Mr. Mathews called you?

A That's correct.

Q And he called you at your home?

A That is correct.

Q And you for some reason just didn't turn on the taperecorder that time?

A The taperecorder was on.

Q So the set up for that meeting was on the taperecorder?

A That is correct.

Q So there would be a taperecording of Mr. Mathews' calling you and saying all those things he said he said, when he called you to set up the meeting which were that he wanted to talk to you about something—He wanted you to pick him up at work and take him home, right?

A Not on that, not on the last telephone recording.

Q But what did you say he told you when he set up that meeting when you picked him up in his car?

A Well, what he said was, I called him back around two o'clock in the afternoon. He had told me to call him back and this was returning his phone call, and he told me that he would like to meet with me around five-thirty after he got off work. And I told him that I had a [284] prior arrangement for some activities in the afternoon, so I, that is the kind of late for me. He says, "Well, why don't you pick me up from work and you can take me home." "So what time would you like for me to pick you up?" He says, "Pick me up at four-thirty at Major Goolsbys". I said, "Where is Major Goolsbys?" He told me where it was, so I said, "Okey, I will be there at four-thirty."

Q So you called him that time?

A I was calling him back after he had instructed me to.

Q Oh, okey. You testified that he called you, isn't that right?

A The last time I called him back as he had instructed me to.

Q Okey. You called him. And he asked you to pick him up and take him home from work?

A That's correct.

Q And that conversation wasn't taped, or was it?

A That conversation was not taped, because I called him from the street, street telephone.

Q Okey. On direct examination it was a different story, wasn't it, Mr. DeShazer?

A Sir, I called him from a street telephone.

Q Okey. All right. Well, during this conversation when you called him up from the street telephone, is that [285] when he said all these things that he had to talk to you about, and all those things he said to you?

A No, that was a very short telephone conversation. What time I should pick him up and where.

Q When were all these other things said that you testified to on direct about he had to talk to you about some pressing things that he had and that type of thing?

A Well, I couldn't just say it was said on this date. He said that to me many times.

Q Okey. So that wasn't on that earlier conversation you talked about?

A Could have been.

Q Wouldn't have been on the tape?

A It could have been on one of the tapes. I am sure it was.

Q You listened to all of them, didn't you?

A I can't just remember word for word what was said and when.

Q Sure.

A It was a lot of tapes involved.

Q Well, when you talked about these conversations back in 1983 and 1982, you remembered everything that was said, right?

A Sure do. Not everything, but the important things that was said.

[286] Q Oh. Who said what and when and what prompted each comment, you remember those things?

A I know enough where as I can explain to someone that's intelligent, they could understand what I am saying.

Q Okey. You got in the car, Mr. Mathews got in the car with you, and you drove up Fond du Lac Avenue, right?

A That's correct.

Q And at some point he pointed out a place for you to pull over, right?

A That is correct.

Q And from the time that you pulled over to the time that he got out of the car, you didn't move the car, right?

A That's correct.

Q In fact you pulled over across the street from the car repair place, right?

A That's what he said it was.

Q What was this, a garage or something?

A It appeared to me to be some type of a service station.

Q Okey. You were right across the street from it, right?

A That's correct.

Q On direct when you said you pulled off to some side street, that wasn't correct, was it?

A I am still talking about the same place.

Q Well, did you pull off on some side street?

A I pulled off onto a street just to the west. I made a [287] left turn and pulled into the side street.

Q You were right across from this service station?

A I was just north of it, yes.

Q In fact Mr. DeShazer, what happened was that you called Mr. Mathews and said you wanted to talk to him?

A That is not correct.

Q Mr. Mathews said the only time you can do that is if you take me to my car, isn't that right?

A That is not correct.

Q You didn't know you were going to take him to his car, you thought you were going to take him home?

A That's correct.

Q Later in your conversation when you were in the car Mr. Mathews said to you, "You may have to take me home", right? That was after he went to check on his car, because he didn't see it in the lot, did he?

A At that time is when he made that statement when he didn't see it.

Q You said, "Where is your car?"

A That's correct.

Q He said, "I don't know, you may have to take me home", didn't he?

A Oh, he said it again, yes.

Q You said, "Where is your car?" You knew what you were sitting there for, didn't you?

[288] A At that time I kind of figured it out.

Q Oh, then you just figured out that you were there on the street next to the service station because Mr. Mathews' car was there, but you didn't see it?

A I didn't see it.

Q But up until that time Mr. Mathews hadn't told you that he was there to pick up his car, right?

A No, he didn't tell me nothing.

Q So you just assumed that, wow, we must be here next to this service station to pick up Fred's car, right?

A No, I didn't assume that.

Q What made you think, what made you say, "Where's your car"?

A Because I knew what kind of car he drives, and he said "I am going to see if my car is ready". I looked and didn't see his car, and I said, "What kind of car are you driving?"

Q When he said that, he said "Well, I am going to see if my car is ready", you said "Where is your car, right?"

A Okey, that's what he said.

Q And you knew that he was going to run over there and look for his car?

A I didn't know what he was going to run over there for. He said he was going to check with the guy and see if it was ready.

[289] Q When did he say that?

A I don't know, about that time when he got out, a little before.

Q You said, "Where's your car?", he said, "Let me run over there, and I will come right back", right?

A That's correct.

Q And no time prior to that in this conversation did he tell you that I am going to pick up my car, right?

A He might have said it just before he told me to pull over.

Q Okey. Well, you say he said to you, "Turn left", and you said, "Right here?" He didn't say anything about his car, did he?

A Councillor, he told me that—

Q Answer my question.

A I'm answering your question. He told me to pull over, and that's the time when he started speaking about that his car was there, around about that time.

Q He started speaking about where his car was?

A I don't think he told he about where it was. I think he told me that after I asked him, where is his car.

Q Right. But what I'm asking is very simple, at no time in that conversation from the time Mr. Mathews got into his car, until the time that he said let me go over, let me just run right over here, was there any discussion [290] that his car was over there or that he was there to pick up his car?

A Not until he got right at the place.

Q You don't think that is right?

A I remember hearing about the car just before he told me to pull over.

Q You remember that specifically?

A I remember the car discussion about that time.

Q You remember that from listening to the tapes and reading the transcripts?

A Not necessarily. I don't have to listen to that, I remember it.

Q But if it wasn't on the tapes and wasn't on the transcript there must have been something wrong with the tape then, right?

A I didn't say it wasn't on there.

Q You said it was said but that you didn't hear it, or it wasn't on the transcript.

MS. KEARNEY: Objection, mischaracterizes the testimony.

MR. KAUFMAN: Okey, you're right.

COURT: Sustained.

MR. KAUFMAN

Q You're not saying that it isn't on the transcripts, or that it isn't on the tapes?

[291] A About the car, its on the tapes.

Q All right. Now, you went through—all right, you talked earlier in that conversation about Mr. Mathews' wife not being able to drive to work, right?

A I don't understand your question.

Q Well, I am trying to help you out. When you were talking about the car, you remember a conversation with Mr. Mathews earlier in the day about, or earlier in that drive to the shop, about his wife not being able to drive to work?

A It might have been said, yes.

Q You recall him telling you at that point, "No, the car is in the shop"?

A Might have been said at that point.

Q Is that what you are talking about, nothing about the car?

A No, that is not what I am talking about.

Q There is another conversation about his car being at that particular place that you stopped?

A That's what I am talking about.

Q You pulled over, you say that you pulled over in that street and you didn't know what that service station, what that was?

A I didn't know what the function was, no.

Q But when Mr. Mathews says, "I'm going to go over there", [292] you knew he was going over there to get his car?

A Based on what he said, yes.

Q He's saying, "I am going over there to get my car"?

A That's what he said, to check on it.

Q Okey. What you are saying, I guess, you didn't know that you were going to take him to where his car was at the time that you picked him up?

A No.

Q But you do admit that you are the one that called him and set up the meeting to take him home?

A I didn't set up the meeting, no.

Q But you are the one that initiated the call where the meeting was set up?

MS. KEARNEY: Objection, your Honor, we have gone over this more times, and it is asked and answered.

COURT: Sustained.

MR. KAUFMAN:

Q Let's go to the conversation that you had in the car. Mr. Mathews starts, after you pull over Mr. Mathews says, "So what con you do for me? What's happening?" And you "Had it in the garage". You recall him saying that?

A I remember the garage statement.

Q And you knew what he was referring to when he said that?

A Sure.

[293] Q He was referring to that twelve thousand dollars that you said that you had gotten?

A No.

Q That you—what was he referring to?

A The five thousand dollars.

Q Okey. But he was referring to this money that he said that you had that you wanted to give him some of?

A That's correct.

Q You said, "Yah, you're right, it come hurten, hurten thing too, because", and then you didn't, you stopped. What did you mean, "it come a hurten thing"?

A It come to a hurten thing because I had so many obligations and I had that money in the garage and I knew it was there, and I had other obligations I could have been using it for.

Q So are you saying that you, that that is what you are talling him, that you have this money in the garage, and its hurting you because its sitting there in the garage?

A That is what I meant.

Q You didn't have it in the garage:

A No, that was just a story.

Q Well, you stopped then, and you then started talking about a U-Haul. You don't go any further there, right? When you talk about the, he brings up the subject of you had it in the garage and you say, you're right, its [294] hurten, and then you stop. Then you started talking about a U-Haul place or something, right?

A I don't really recall that specific. I would have to listen to the tapes to verify what you just said.

Q Okey. Later on in the conversation Mr. Mathews and you talk about them holding you up, "they're holding you up so you can't even start on the contract", you remember that: People holding you up? The discussion, holding you up?

A Yes.

Q At that time you knew that your holdups were being caused by the people at the SBA who had the power to issue the advance payments, right?

A At that time, yes.

Q And you and Mr. Mathews was just talking about that, right?

A Yes.

Q And he's talking to you about your problems with your advance payments, he said it wasn't the SBA's fault as much as it was the bank's fault, you recall that discussion?

A I remember that discussion.

Q You talked about all the contracts that you had, that you hadn't started on, right?

A Correct.

[295] Q And he is telling you that once you get one of those, or get those contracts completed, or get those contracts started, that everything is going to be okey, the ball is going to start rolling, you are going to get your line of credit, you are going to get back in business, right?

A That is what he said.

Q What was important was to finish that first contract so that you can get money in the subsequent contracts, right?

A That's what he said.

Q Later in the conversation he asked you, "Did the big guy really loan you that money like you said?" You remember him saying that?

A I don't remember that statement being made.

Q Remember him saying that, "Did the big guy really loan you that money?" You said—

A I don't remember the exact words, "Big guy".

Q Okey. You read the transcripts and that's what is stated on the transcripts, right?

A When I read the transcripts I said that I did not understand it being said in those words.

Q So when you testified earlier that the transcripts accurately reflected what you heard on the tapes, that wasn't true in some instances, was it?

[296] A Well, the Big guy, I knew what he meant, but unless, I was the guy that listened to the conversa-

tions that the tapes, somewhat might misunderstand what it meant, but I knew what he meant when he said that.

Q When did he mean?

A The individual that I had told him about in Chicago that was going to give me the equity loan on my house that I had requested.

Q That is the twelve thousand dollars that you told him about?

A That is correct.

Q He is asking you, "Did he really loan you that money like you said?" Remember him asking you?

A I remember him asking me that.

Q And he said, "Did he really loan you that?"

A I remember him asking me that, yes.

Q This is, this conversation was well over a month after this first conversation which you told us about that took place at the Hyatt where you proposed to give him some money?

A Well, it wasn't over a month.

Q It wasn't?

A It was after.

Q What was the first time you said, "I have got twelve thousand dollars, and I would like to give you some, [297] Fred". What was that—do you remember that conversation?

A I remember that conversation. Yes.

Q When was that?

A The exact date I don't recall, but I know it was at the Jo Jo's Restaurant on Port Washington Avenue.

Q Jo Jo's on Port Washington?

A Yes.

Q You recall that specifically?

A I recall the conversation.

Q And you don't know when that was, you don't know if it was—do you remember the month?

A No, couldn't even say that I remember the month. I was not taking daily notes.

Q But you were taping that conversation, right?

A I was taping the conversation. The date would be on the tape.

Q But the tapes didn't come out, did they?

A Not too clearly. Some of them didn't.

Q So if you were taping that conversation maybe this will help, it was after the FBI had instructed you on how to adequately use the machines, right?

A That's correct.

Q You had been trained on how to run them and how to get good recordings, right?

[298] A Yes, I had been told.

Q And so this conversation that is where you brought up the twelve thousand dollars was after you had been trained?

A Well, trained, explained.

Q Okey. But that tape never came out, did it?

A Not too clearly.

Q And you say that you told Mr. Mathews during that conversation that you were in real tough financial position, but that you were getting a twelve thousand dollar loan from some guy in Chicago?

A That is correct.

Q And that you were going to use some for your house?

A I didn't say that.

Q You were going to use part of it for something related to your house?

A I didn't say that either.

Q You didn't tell him anything about your house?

A Not from the standpoint of using that money for it, other than using the collateral to make the loan.

Q And you were going to use this twelve thousand dollars for your own personal use, right?

A Seven thousand dollars.

Q Well, that money that you got from the guy in Chicago, some of it was going to be used for your own personal [299] use?

A That is correct.

Q And you wanted to give Mr. Mathews some of it?

A That is correct.

Q And you were the one that proposed this deal, right? At this meeting at Jo Jo's?

A I don't know if you want to say I proposed it, I was the one that was discussing it.

Q Well, had Mr. Mathews asked you for any loans or anyother money within six months of that meeting?

A Mr. Mathews stopped asking me for money in July, around about of '84, and this was after I found out that he had not submitted my documents like he had told me he had.

Q Did you ever find out whether he really submitted those documents or not?

A Sure did.

Q Not just from your discussions and what you assumed, but by somebody telling you from the SBA or you actually looking at the file or something like that?

A Mr. Howard Norris from Chicago verified they received them October the 31st, 1984. They left Milwaukee October 30th of 1984.

Q So in October these, all these papers that Mr. Mathews was supposed to process for you were gone in October, right?

[300] A They left Milwaukee October 30th.

Q These were advance payments on the navy watch cap contract?

A These were the documents for the advance payments on the Navy watch cap contracts.

Q And you didn't get those advance payments, did you?

A Not until February of this year.

Q February of this year you got some money?

A That is when they were cleared.

Q When did you get the money?

A The money was deposited some time in March, if I recall correctly.

Q So you got this ninety thousands dollars in March of 1985?

A That is correct.

Q You had that money?

A Yes.

Q All right. When you are in the car, going back to this conversation again, we regress sometimes, but bringing you back to the car conversation, Mr. Mathews is telling you if you are going to be able to do something, if you are going to be able to give me something like you to go ahead and do it. How long have you been telling him that you were going to be able to give him some money?

A I think approximately a month, three to four weeks, I would say.

[301] Q He tells you just like now I got to go see about this car, right?

A Pardon me?

Q He says, just like now I got to go see about this car, see if I can pick it up?

A Something to that effect, yes.

Q You are also talking about, later he talks about bad luck, you have bad luck, right?

A He said that.

Q Both of us damn near about the same time had bad luck, right?

A That is what he said.

Q He is talking about your financial position within the last few months, right?

[302] A Actually, if he was talking about my financial position then, he was going back to March of 1984.

Q And talking about his own bad luck, you know what he was talking about there?

A I don't know, not unless he says well, I don't have the money he can't get it. I don't really know what he

was talking about. I was listening to him, but I really wasn't trying to figure out what he was talking about.

Q Did you know anything about his personal situation when you had this conversation?

A Did I know anything about his personal situation? I didn't, not really, no more than what he could tell me.

Q Well, right. Things that he would tell you. Did he tell you no, that he had been, received the letter saying they proposed, people at SBA proposed to remove him from his job?

A Did he tell me that?

Q Did you know that?

A I don't recall him telling me that.

Q Did you know that?

A I did not know that.

Q You don't recall him asking you to send a letter to the SBA or his lawyer asking you to send a letter to the SBA saying that to help him out?

A At one time he says that he might have to request that I [303] send him a letter showing his support of the program.

Q You didn't know he was having a lot of difficult at that time, is that what you are saying?

A No, I didn't. Didn't know a thing about it.

Q Well, then he goes on talking about how he got to keep a, how a black man has to keep a smile on his face and even function as though he was on top of the world when everything bad is happening to him. You know what he was talking about then?

A I knew what he was talking about then. He was talking about having to look like you are still successful and everything is going well, even though things around going on well, right. That is not my interpretation of what he said, that is your interpretation.

Q And he has to keep moving with a smile on his face and still eat and function like he is on top of the world, and the bottom is falling out of the ship. What is, what does your interpretation of that?

A Well, he was asking me for money. He knew my personal financial situation, so I don't really know why he was telling me that.

Q So you don't have an interpretation on that?

A I just told you my interpretation.

Q And your interpretation is, you don't know why he was telling you that?

[304] A Not really, no. I don't know why he was making those statements.

Q Right after he said that, he said to you, he doesn't want you to mention money to anybody, right?

A He said that to me.

Q He said that right after he said, made this statement about the functioning as though everything is okey, right?

A Probably.

Q Now, Fred was your business development specialist for you say a couple years, 1983, December 1983?

A Several years, yes.

Q And in that time his job was to help your business along, right?

A Well, he was a development specialist, so I guess his job was to help me to develop.

Q It wasn't unusual that Fred would give you kind of pep talks, right?

A I don't know what you mean by pep talks.

Q Well, tell you that things are going to be okey, that you are going to be making a lot of money, I am going to get you contracts and things are going to be okey, right?

You just got to get things worked out and things will be okey?

[305] A That was my understanding, that was what was said regularly for the last eight to ten months. I always marketed for my own contracts prior to 1984.

Q You didn't have any SBA contracts prior to 1984?

A I didn't say that.

Q You had SBA contracts before you started dealing with Fred Mathews, correct?

A That is correct.

Q You had SBA loans back before Fred was even a member of the SBA, working with SBA?

A Go back to 1970. 1970 I received my first SBA.

Q That was before Fred started with the SBA?

A Probably. I don't really know when Fred started there, but I don't think he was there then.

Q Well, when you got your SBA loan, you were Esquire Knitting, right?

A The first one, yes.

Q And did you ever have to do anything with the City of Milwaukee in terms of loans or getting contracts or anything like that?

A The City of Milwaukee? No.

Q You never had any dealings with any governmental agencies of the City of Milwaukee back in, when you were Esquire Knitting?

A Not the City of Milwaukee.

[306] Q The County of Milwaukee?

A Not the County of Milwaukee.

Q You know what Fred did before he joined the SBA?

A I know that he was with a different agency, but I had never met him while he was there.

Q You never met him?

A No.

Q You knew where he worked? Did you?

A No, I didn't.

Q Well, you said something in going back to the telephone conversation in the, the conversation in the car, you talk about keeping a person happy, and then Mr. Mathews says, "Well, I didn't have any hangout, hangup, about being unhappy, being unhappy. Just the fact that I thought your situation was much better than it was with other contracts and banks".

Recall him saying that?

A I remember him making that statement, yes.

Q Then you change the subject and said, "Well, what put me down the drain was having to unload the inventory off season", right?

A Right.

Q So we got off that subject pretty quick, didn't we?

A I don't know, if you recall I was still on the same subject. In my mind I was still on the same subject. [307] Q Now you also had a conversation when you were in the car, part of the conversation, Mr. Mathews says, "I have done as much as I possibly can, plus anything that comes up, you know I definitely do it anyway, regardless. But if you are going to do something, well, just maybe you just go ahead and do it".

You recall that?

A I recall that, yes.

Q And he had discussed that with, that type of subject of whether he would do things for you regardless any way, you discussed that before, hadn't you, with Mr. Mathews?

A Not on those terms, the way you said it.

Q Well, at some time in 1984, did you have a discussion with Mr. Mathews where you asked him if he was holding up your advance payments?

A I asked him that many times.

Q And at some time did you have a discussion about whether he was?

A Yes, I did.

Q And in each of those discussions did he vehemently deny holding up your advance payments?

A He always denied it.

Q But you just kind of figured that he was?

A After I talked to Mr. Mathews in July and based on what he told me, I found out that he had not submitted my [308] documents, I did not trust him, because he knew the financial position that he had put me in, and if the money was not coming he could have told me I could have made different arrangements as far back as February or March.

Q But he didn't make the decision as to whether the money was coming, did he? That you found out later and which you are experiencing now, correct?

A I am not talking about the decisions. I am talking about him telling me exactly how things are.

Q You talked to Mr. Mathews on a day to day basis?

A In a week, I guess.

Q Between January of 1984, and February of 1985?

A How often did I talk to him?

Q Yes.

A Quite often. Four or five times a week.

Q How often did you talk to Bob Henderson between November of 1984 and February of 1985?

A I don't know how often, but quite frequent.

Q How often did you talk to Bob Miller?

A On a daily basis.

Q Between July of 1984 and February of 1985?

A I talked to Mr. Miller very seldom.

Q How about Mr. Charter?

A Maybe once or twice. I hardly ever called Mr. Charter.

[309] Q How about Mr. Gordon?

A Very seldom. Maybe once or twice.

Q What about Mr. Cameron?

A Mr. Cameron, maybe two or three times. I say between three to five times. Total or—

Q Total.

A Specifically three times total.

Q You remember having a discussion with an FBI agent in January of 1985?

A Yes.

Q Was that the first time you talked to an FBI agent?

A I think January '85 is the first time.

Q And you tell Mr. —— that was Mr. Woodring?

A That is correct.

Q Yesterday you said that you first started working with Mr. Mathews in December of 1983, is that right?

A This particular contract, yes.

Q Well, did you work with him before that?

A On other matters.

Q When did you start with that?

A I don't recall the exact date, but he was the business development specialist for the 8A contractors, so could have gone back for a year, maybe two years. My first time of working with Mr. Mathews was in 1979. At that time he was a loan officer with the SBA, I think that is [310] when I first had personal contacts with him.

Q Are all your contracts with the SBA in the Navy still delinquent?

A Yes, they are.

Q You say you have received an advance payment recently, two months ago?

A I received the advance payment, it was either May or April.

Q When you talked to Mr. Woodring in January, did you tell him about this first time Mr. Mathews asked you for a loan?

A I am fairly certain that I did.

Q And did you tell him that that was the time when Mr. Mathews said that he had personal problems and the meeting was a personal one rather than a business relationship.

A I told him that he wanted the money for a personal reason.

Q You didn't tell him that Mr. Mathews told you that the business was, the meeting was a personal one rather than a business one?

A He didn't make that statement, Mathews didn't make that statement and I didn't make that statement.

Q Well, did you tell the agent that Mr. Mathews explained to you that he had a daughter attending college and he [311] needed to borrow fifteen hundred dollars?

A He told me that that was the problem.

Q You told the agent that you gave Mr. Mathews the money?

A That is correct.

Q Then you told the agent that he asked you later for another loan?

A That is correct.

Q And that was for twelve hundred dollars?

A That is correct.

Q And that that was for Mr. Mathews to clear up some delinquent notes, right?

A That is correct.

Q And that you had, you borrowed some money from your friends to pay him that loan?

A Not friends, a friend.

Q You didn't say "friends"?

A Not "s", no.

Q In fact when you talked to the agent, you talked about those two loans, correct?

A That is correct.

Q And you didn't tell him, the agent about any person that had lent you money for those loans, did you?

A I told him that I had to borrow the money.

Q You didn't tell him you had to borrow the money for the first one, did you?

[312] A I did.

Q In that interview you told the agent that Mr. Mathews still owed you that twenty-seven hundred dollars, right?

A That is correct.

Q That was the twenty-seven hundred dollars for those two loans that you talked about?

A That is correct.

Q That was in January of 1985 you told us earlier that Mr. Mathews had paid you some money back?

A That is right.

Q Two hundred dollars?

A Prior to that, yes.

Q So that would have reduced the twenty-seven hundred dollars to twenty-five hundred dollars, wouldn't it?

A No, that is not correct, the way you said it.

Q You told also the agent that your lawyer, Mr. Yanisch, had written a letter to Mr. Mathews in December '84, requesting for repayment of the money?

A I didn't say my lawyer wrote the letter.

Q You didn't tell the agent that your lawyer wrote that letter?

A I did not say my lawyer wrote the letter.

Q Well, in January, you told us before that Mr. Mathews' requests for money stopped in July of last year, 1984?

A Yes.

[313] Q There hadn't been any discussions about that until you brought it up at that meeting at CoCo's, right?

A That is correct.

Q However, you told the agent in January that Mathews continues to ask for money, and that during the period between February and July he called you at least fifteen times?

A That is correct.

Q That he has called you as many as five, six times in a single day for requests for money?

A That is correct.

Q Where you said he continues to ask for money in January of 1985, does that mean he continues to this day?

A No, I didn't mean that.

Q Well, yesterday you said you could remember nine times that Mr. Mathews had asked you for money, right?

A I said approximately.

Q Approximately nine. Could it be as high as fifteen?

A Could be very easily, yes.

Q Did you tell the agent that even when the firm was working out of Chicago, Illinois, he had requested you for money or made hints for money?

A I never said that. I never knew he ever worked in Chicago.

Q So you didn't tell the agent that in January?

[314] A I didn't tell him anything about Fred working out of Chicago.

Q Would you say that in December and January you were kind of a desperate man?

A What month, sir?

Q December and January.

A Of '84 and '85?

Q Yes.

A Very desperate.

Q You were getting a lot of heat from the people from the Navy, right? People that were coming by and asking you where the goods were?

A No. I was not getting a lot of heat from the Navy.

Q You didn't tell anybody that you were getting a lot of heat from the Navy?

A I might have said I was getting a lot of heat, but it wasn't directly from the Navy. The purchasing agent was concerned about the contracts and the status of it.

Q There were people in the Navy that would come by your place and check on your progress every now and then, right?

A They weren't from the Navy, no.

Q I am sorry. Where were they from?

A From DCASMA here in Milwaukee.

Q That is the Department of Defense's branch, right?

[315] A That is correct.

Q That administers these things?

A That is correct.

Q They were the ones that were giving you the heat?

A They weren't giving me heat.

Q Well, during a visit to your plant you pulled Ms. Ostrey aside, right?

A I didn't pull her aside. She was my inspector, I didn't have to pull her aside.

Q Okey. You told her that your problem was because Fred Mathews was holding up your advance payments, right?

A I did not tell her that. I only told her about my suspicions. She was not the first one that I told that to.

Q Did you ever record any conversations with Mr. Mathews when you used your own equipment?

A Yes, I did.

Q When was that?

A I think I started doing that in November of 1984.

Q You taped a lot of conversations with Mr. Mathews from November '84?

A Not a lot. I think it was three.

Q Did the FBI get the tapes?

A They got one.

Q What was on the other tapes?

[316] A I,—actually basically the same thing, but the messages were erased.

Q Oh. Okey, what were the messages?

A The messages or the conversation involved my present situation and one one of the tapes I asked Fred—as a matter of fact the Saturday he gave me the two hundred dollars I taped that conversation with him, because he was very reluctant to talk to on the telephone. It was a very short conversation, and when I made the tape that I gave to the FBI agents, that tape was erased because every time he would start a new tape it would erase the original message.

Q But at no time during those conversations with Mr. Mathews did he ask you for money?

A He was not asking me for money then.

Q You wrote a letter to Curt Charter of the SBA in December of 1984, you remember doing that?

A I remember writing Mr. Charter a letter about that time, yes.

Q What did you tell Mr. Charter in that letter?

A I was basically telling him about my problems, and a meeting that I had had with him earlier, and I was more or less trying to get him to use his authority to release the log jamb so that I can get into my contracts.

[317] Q And you had conversations with Mr. Miller and Mr. Henderson in December of, and November of '84 on the same lines, right?

A Yes, I did.

Q You told him about your problems with Mr. Mathews?

A I did not tell them about a problem with Mr. Mathews. I told them about a problem I was having with my contracts, getting my payments for the contracts.

Q Well, did you tell anybody from the FBI that you had told Mr. Miller and Mr. Henderson about your problems?

A They knew about my problems. And I told them that, yes.

Q You haven't seen a report of the conversation that you had with the FBI agent then, is that right?

A His personal report? I never seen it.

Q What was your financial situation between November of '84 and June of '84?

A My financial position? My company?

Q I beg your pardon?

A My company?

Q Did you have money coming in on a daily basis?

A We were in production, we were making a profit. The company had a positive net worth. It was Mr. Mathews had all that information, he knew.

Q This letter that you talked about that you wrote to Mr. Mathews in November, did you write that letter?

[318] A I rough drafted the letter. My wife typed it.

Q Your lawyer didn't have anything to do with that, right?

A No, he did not.

Q Your lawyer didn't write any letter in November or December of '84 about your problems with the advance payments or money that Fred Mathews owed you?

A No, he did not.

COURT: Counsel, are you about finished with the cross-examination?

MR. KAUFMAN: I think so, Judge.

COURT: All right.

MR. KAUFMAN:

Q I want to go through the events of the night before Mr. Mathews was arrested and the morning before Mr. Mathews was arrested one more time.

Do you recall of any meeting with Randy Aden of the FBI the day Mr. Mathews was arrested?

A Yes.

Q After Mr. Mathews had been arrested?

A That too.

Q And you debriefed Mr. Aden about what happened in the last two days?

A Did I do what, sir?

Q Did you debrief him? You had a conversation about what happened?

[319] A With who?

Q Mr. Aden?

A After?

Q After the arrest.

A No, I did not talk to Mr. Ade after the arrest. I talked to another agent.

Q Aden, Randy Aden, Randy Aden.

A Oh, yes.

Q Did you tell him that Mr. Mathews didn't call you the morning of April 24th?

A He didn't call me?

Q That he did not call you the morning of the 24?

A I probably told him that.

Q That you talked to Mr. Mathews in the SBA office that morning?

A That is correct.

Q And Mr. Mathews couldn't meet you for lunch?

A That is correct.

Q That he would call you later to arrange a meeting, right?

A That is correct.

Q And that later that morning you called Mr. Mathews from the Pfister Hotel at eleven A.M. right?

A That is not correct.

Q You didn't tell him that?

[320] A That I had called him from the Pfister Hotel at eleven A.M.? Oh, I'm sorry, I did call him. I did. I am sorry.

Q And that in that conversation you told Mr. Mathews you were going to meet the man from the FBI?

A That is correct.

Q Right.

A That is correct.

Q And that you were getting very nervous with that money in your garage, and you wanted to get rid of it, right?

A I didn't say "garage".

Q Well, that you were nervous with that money that you had?

A That is correct, I did say that.

Q I am going to say "money in the garage", because that will make it different than the other money that you talked about. You talked about advance payments and things like that in the case. So when I say "money in the garage", that is what I am talking about.

A I understand you, counsel.

Q Okey. You told him, Mr. Mathews, that you wanted to avoid going through a second divorce should your wife learn about that money in the garage?

A I made that statement, yes.

Q And then Mr. Mathews said he would call you later, [321] right?

A That is correct.

Q And that then you went back to your office and you called Mr. Mathews again, right?

A That is correct.

Q To confirm that you would meet Mr. Mathews at one-thirty, right?

A That he would meet me at one-thirty.

Q All right. Mr. Mathews at that time told you that he would call you right back, but he never returned the call?

A Not before I left for my appointment, he didn't.

Q And then later at one-thirty you called Mr. Mathews again, right?

A That is not the way it went.

Q You didn't call Mr. Mathews at one-thirty?

A I didn't say that.

Q You did call Mr. Mathews at one-thirty, right?

A After I had checked with my wife to find out that he had tried to call me approximately three times, I returned his call.

Q And in that call, you called Mr. Mathews, you told him that you had the documents that he wanted, and that was referring to the payment plan for delinquent taxes, right?

[322] A I told him that I had the documents. I didn't say the document that he wanted.

Q Well, the document you were referring to was the payment plan for delinquent taxes?

A That is correct.

Q All right.

Q And that you asked him to meet you at the Greenery Restaurant, right?

A That is not what I said.

Q You didn't ask Mr. Mathews to meet with you at the Greenery—

A I did not ask him to meet me any place.

Q Okey. Well, how did you arrange to meet at the Greenery Restaurant?

A I did not arrange, I told him where I was and how long I was going to be there. If he still wanted what he had asked me for, I was going to be there approximately half an hour. If he wanted it he could come and get it.

Q What had he asked you for?

A That is what I said.

Q Okey. That would have been on the tape, then, of that conversation?

A I was not taping that.

Q Jo Jo's is up near your house, right?

A Jo Jo's and CoCo's is one establishment.

[323] Q Oh, it is the same place?

A A new name is CoCo's. Originally was JoJo's.

Q So you met at JoJo's and then later at CoCo's? That was some place up in Glendale near where you lived, right?

A Yes, it is.

Q You suggested those place at places to meet with Mr. Mathews, right?

A Yes, I did.

Q Would you say Mr. DeShazer, that you were a friend of Mr. Mathews, personal friend?

A I think I could say that at one time, yes. I thought I was, any way.

Q For about how long?

A I was convinced that I was in July.

Q July of '84?

A July '84.

Q In fact you told Mr. Little that you loaned Mr. Mathews fifteen hundred dollars on one occasion because he was a good friend and he needed the money for his family?

A I did not say because he was a good friend. I said because he seemed to have been very depressed for the money.

Q You didn't say it was because he was a friend? You didn't tell Mr.—

A I did not say it like that, no.

[324] Q Didn't tell Mr. Little that you considered Mr. Mathews a friend with a genuine need?

A I don't think that I said it in those terms.

Q You testified on direct that Ms. Ostrey was very upset in December, right?

A I didn't say in December.

Q Well, when was Ms. Ostrey upset?

A She was very upset when I told her how Mr. Mathews had been asking me for—

Q She wasn't upset when, because of your delinquencies on the contracts?

A No, she has never been upset.

Q As a matter of fact you had pretty good relations with those people from the DCASMA, right? Visited them fairly often?

A Had a very good relation, and I have a very good relationship with them now.

Q They are in the same building as SBA, right?

A That is correct.

Q You can go and visit the people at the SBA and the people from DCASMA or Defense Contracting Firm, often?

A I have.

Q And in fact they gave you some progress payments, didn't they?

A I received progress payments, yes.

[325] Q You received those progress payments during 1984, right?

A During 1984?

Q Right.

A No, that is not correct.

Q When did you receive those progress payments?

A The progress payments were for a contract that was awarded in 1982.

Q So those were the only progress payments the Navy has ever given you?

A No, they weren't. I have received progress payments before.

Q You never told the FBI about this payment of two hundred dollars when you talked to them, did you?

A No, because it had been repaid already.

Q Is the contract that was awarded in '82, that the same one that is still delinquent?

A That is the one that is still delinquent, yes. As a matter of fact they all are delinquent.

Q So you received progress payments on that contract but no advance payments?

A No advance payments until recently.

Q The SBA know about those progress payments?

A They should have. They were the prime contractor. If they didn't they got a problem.

Q You wouldn't have kept that from them, would you?

[326] A Sir, they were the ones that clarified that, not me.

Q The progress payments?

A The—everything in relation to a contract. They are the prime contractor. The prime, the prime—the progress payments is fed into the system through the federal government and the Small Business Administration because they are the prime contractor. I am the last guy to get the notation of it. And not only that, it is recorded in every financial statement that I have submitted to the SBA, which was on at least a quarterly basis also.

Q All those financial statements would have something about progress payments, right?

A Every one.

Q All right. One more area of questions, then I am done.

You were a member of the 8A, group of 8A contractors, right?

A That is correct.

Q And you, as a group, would have meetings every now and then, right?

A That is correct.

Q And those meetings you alluded to some of them in some of those conversations with Mr. Mathews, that we heard today, right?

A I don't know what alluded means. Explain it to me.

[327] Q You talked about it?

A I understand what you are saying.

Q On one of those, right?

A That is correct.

Q Okey, and you said that you knew Mr. Palmer and Mr. Reid, right?

A I know them very well.

Q Irv Palmer and Tommy Reid, they are other contractors in the 8A program?

A That's correct.

Q And you discussed your problems with them in January of 1985, didn't you?

A I discussed it with them. It could have been that time, probably, right.

Q You had a meeting at the Marc Plaza Hotel?

A We did.

Q And you told them that Fred was holding up your advance payments?

A I told them that that was my suspicion, based on the evidence that I had received. I did tell them that, yes.

Q And they told you that is impossible, that he doesn't have the ability?

A They did not tell me. First of all, they couldn't tell me that because they don't know his ability.

[328] Q They don't anything about what Fred can do at the SBA?

A I didn't say that either.

Q They offered to help you with some money?

A They thought they could arrange it.

Q They said for you to contact them and arrange it, right?

A No, they did not say that.

Q They never did?

A They did not say that.

Q You never did contact them for any?

A That is not correct. They couldn't do anything. They found out they couldn't.

Q The tape recordings that we listened to, the ones that the tape recordings that you talked about the meeting at CoCo's in February, the first meeting when you talked about the money in your garage, and the tape recordings of the meeting in the car, those were provided to the FBI approximately, well, quite some time after you had those meetings, right?

A Usually the day after, no more. I think that was one occasion where my phone was disconnected, I had problems and they had problems making contact with me, I think it was about two days, three days, but that was the most that any given time. Usually the day after.

Q That is the most time, three days?

[329] A I would think that would be correct.

Q So if you had a conversation with Mr. Mathews on April 5th and April 8th, you would have given it to them at least April 17th? April 15th? It would be a delay of ten and seven days.

A I really don't think so. I really don't think so. But I wouldn't swear to it. One time I was kind of out of pocket for a while, so to speak.

Q You wouldn't have had those in your possession that long?

A I didn't understand you.

Q You wouldn't have had those in your possession for that long?

A They would have been in my home until they were retrieved them.

Q Did you tell the people from the Navy that you had never given Fred Mathews any money?

A Did I tell the people from the Navy, I did not? I didn't say that.

Q You didn't?

A No, sir.

Q Or the people from DCASMA?

A I told them I had.

Q Did you tell the people from the Navy that Fred Mathews had asked you for money three times?

[330] A I don't recall that. I told them he had borrowed money from me personally three times.

Q And that the amounts he had requested were three thousand, fifteen hundred and five hundred?

A I made those statements to them, yes.

Q You knew Mr. Mathews socially before?

A I wouldn't call it socializing, but we have had lunch together on numerous occasions.

Q Well, go out for drinks afterwards together?

A Very seldom. I think once, maybe twice.

Q Play a lottery together down in Chicago?

A Oh, I used to buy lottery tickets on a weekly basis.

Q You and Mr. Mathews did the lottery thing together?

A We didn't do it together, I took his tickets for him.

Q For his wife?

A Yes, for Beverly also.

Q Ever go to the fights with Mr. Mathews?

A Fights? No. I don't know, I would like to have, if they had a good fight, but there was no fights to go to.

MR. KAUFMAN: Thank you, Mr. DeShazer, I have nothing further.

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STIPULATION AS TO TAPE

(R. 38: 347-49)

* * * *

[347] MR. KAUFMAN: Your Honor, we have two stipulations at this point.

The first stipulation, Ms. Kearney will [348] correct me if I am misstating it, is that of all the tape which are recordings of conversations between Mr. DeShazer and Mr. Mathews, which the FBI has in its possession, that from February 28, 1984, to April 23, 1985, none of the—the only tape recorded conversations where Mr. DeShazer and Mr. Mathews discussed payments between Mr. DeShazer and Mr. Mathews, is the one conversation in the car, the automobile.

MS. KEARNEY: Well, its the tapes which are in evidence, telephone conversations. That was not a telephone conversation.

MR. KAUFMAN: I am talking about all tapes.

MS. KEARNEY: The only tapes, there are no additional tapes with information pertaining to the payments, that is correct.

COURT: Now, which is it? Is it the way counsel stated it initially or is it the way you have amended it?

MR. KAUFMAN: I think, to be simple, from February 28th until August 23rd, or April 23rd of 1985, of all of the tapes that the FBI has in its possession, there is only one tape where there is discussions of these payments and that is the one which was played for the jury where the discussion in the car.

MS. KEARNEY: That's correct, your Honor, that [349] is an accurate statement of the stipulation.

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STIPULATION AS TO FBI 302 REGARDING JAMES DE SHAZER

(R. 38: 349-56)

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[349] MR. KAUFMAN: The other stipulation is that if, I will have this marked as Defense Exhibit Number 104, and if called to testify, Donald Woodring, agent with the Federal Bureau of Investigation would testify that he conducted an interview with Mr. DeShazer on January 18th of 1985; that——

MS. KEARNEY: I think we should be sure Mr. DeShazer, should Mr. Mr. DeShazer, since he has been a witness in the case, he excluded from the courtroom while the sequestration order in view of the fact that we do have evidence coming into court at this time?

COURT: All right, Mr. DeShazer, the Court has previously ruled that witnesses in this case should not be present during the offer of other evidence or other testimony, so I am going to ask you to retire to the witness room and the Clerk will show you where that is.

(Mr. DeShazer retires from courtroom.)

MR. KAUFMAN: I think I better start over.

If called to testify, Donald Woodring, FBI agent, would testify that on January 28th, of 1985, he conducted an interview of James DeShazer, and that to the best of his recollection he reduced the statements made by Mr. DeShazer to writing in what is known as an [350] FBI 302, which is a report of investigation, and that that 302 contains the statements which Mr. DeShazer made during that interview to the best of his recollection.

MS. KEARNEY: That's correct, your Honor. That is the stipulation.

MR. KAUFMAN: I would offer Defendant's Exhibit 104 into evidence.

MS. KEARNEY: No objection.

COURT: All right, Exhibit 104 will be received.

MR. KAUFMAN: Your Honor, I would like to read from that exhibit if I may.

COURT: Proceed.

MR. KAUFMAN: I would like to read from that exhibit certain portions of that exhibit at this point if I may.

COURT: Is there any objection?

MS. KEARNEY: No, your Honor.

COURT: All right.

MR. KAUFMAN: I won't read the entire thing, because it is three pages long, and I will be reading portions of it.

MS. KEARNEY: Your Honor, I would ask if it be read that it all be read.

MR. KAUFMAN: Okey, I will read it all.

[351] James D. DeShazer, 6920 North Peachtree Drive, Glendale, Wisconsin, provided the following information.

Stated his telephone number at the above address is 350 9997.

COURT: This has to be taken down so read it a little slower.

MR. KAUFMAN: I am sorry.

He is the president and one hundred percent owner of Midwest Knitting Mills, Inc., 2822 North 5th Street, Milwaukee, Wisconsin.

His wife, Fanny, is secretary-treasurer of the corporation.

The corporation was incorporated in July of 1970 as Esquire Knitting Mills. The name was changed in 1979.

DeShazer advised he has government contracts since 1977, and entered the Minority Contract Program, known as 8A in 1978. He has continuously held government contracts since that time.

Under normal operating conditions he employs twenty-three individuals. At the present time the company has four government contracts outstanding through the Small Business Administration. SBA is a program.

[352] All of these contracts are delinquent as to the delivery of the manufactured products.

James DeShazer stated the reason for the delinquency is he needs advance payments on one particular contract. This contract involves the production of Navy watch caps on which there is an advance payment of a hundred and fifty thousand dollars that was due him, but has not been received as yet. This Navy contract for the watch caps was awarded in January of 1984, and the contract included receipt of an advance payment which we usually made within thirty days. If there are problems the receipt might take sixty days.

James DeShazer stated that the individual involved in administrating these contracts is Fred Mathews of the SBA. Mathews is the only individual who is available to work with contractors under the 8A program.

DeShazer stated he first started to work with Mathews in 1982. In 1983 Mathews called DeShazer and requested a meeting. They then arranged to have lunch together. Mathews stated he had personal problems and the meeting was a personal on rather than a business relationship. He explained that he had a daughter attending college and needed to borrow fifteen hundred [353] dollars for a period of two weeks. Mathews stated that he would repay the money when he got his vacation check.

DeShazer said he gave him the money and realized later that Mathews was not going to pay the money back. He realizes that he should never have loaned him the money in the first place as it was not ethically correct.

Some two to three months later Mathews and DeShazer met in DeShazer's car. Mathews stated that he was working on a deal to pay back the money. This would include a second mortgage on his home. However, he needed to clear up some delinquent notes in order to get the second mortgage. He asked for an additional amount of money from DeShazer, which he claimed he would repay in two to three days. He needed twelve hundred dollars and suggested that if DeShazer did not have it he

could borrow it from somebody. DeShazer stated he did borrow money from some of his friends and gave Mathews twelve hundred dollars he had requested.

He then began to realize he was not going to be repaid. In February of 1984 a meeting was arranged with Mathews to discuss the advance payments under the contract with the Navy mentioned above. DeShazer met Mathews at CoCo's Restaurant on Port Washington Road. [354] At that time Mathews stated that he continued to have problems and needed the sum of three thousand dollars. DeShazer refused to give him the money, realizing that giving him the original twenty-seven hundred dollars was wrong, and further because he was not going to give it back.

DeShazer has also discussed his financial problems with Mathews with an Attorney, Dick Yanisch, and John Daniels, an attorney with the firm of Quarrels and Brady. Yanisch had written a letter in December of 1984, to Mathews, asking that the money be repaid and involving the advance payments.

DeShazer has also discussed his financial problems of his company with Trevor Morris of the Heritage Bank and with consultant Chuck Harley of the Harley Company, telephone 466 1008.

DeShazer stated, Mathews knows that he has continual overdrafts at the bank. However, Mathews continues to ask for money. During the period of February to July of 1984, DeShazer estimates he has been asked at least fifteen times for money by Mathews. Each time he called it at loan. Mathews has called him as many as five to six times in a single day with such requests. The amount has varied from some twelve hundred dollars to as low as three hundred or two hundred [355] dollars.

DeShazer stated, even when Mathews was working out of Chicago, Illinois, he had hinted around about needing money. DeShazer claims he is naive in such matters and missed the hints. And therefore did not receive the

advance payments that he should have receivd. In July of 1984 DeShazer called Mathews and at this point he had two weeks until he was required to make the delivery on the contract involving the Navy watch caps. At that point Mathews was unable to quote an exact amount of the advance payments that were due and just said, the amount due was fifty thousand dollars.

Fred Mathews hesitated about the amount of money that was due, DeShazer knew that Mathews had not filled out the paper to process the receipt of the advance payment.

A breakfast meeting was held with Mathews shortly following this, at which time Mathews Vehemently denied that he required payment before the completion of the advance payments. DeShazer stated, however, he feels because of the action or inaction involved, that this is the case.

DeShazer recaped at this point that Mathews still owed him the amount of twenty-seven hundred [356] dollars. DeShazer believes that there were some four other individuals who have been approached by Mathews. These include Central Manufacturing Company owned by Irv Palmer who has also had problems with the advance payments, a George Vincent of Racine, Wisconsin, owner of Turner Box Company. The fourth individual is unrecalled at this time.

DeShazer stated that he would be willing to consent to have his telephone calls monitored or carry an electronic device on his person in order to record conversations he might have with Mathews, and he agreed to the installation of a closed circuit camera in his office, in order to record meetings and possible pay offs with and to Mathews should that be a feasible installation.

DeShazer further stated he would be willing to testify in a court of law.

DeShazer provided no further information.

I have nothing further.

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STIPULATION AS TO MR. PRUIT'S TESTIMONY ABOUT MR. HENDERSON

(R. 38: 456-57)

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[456] MR. KAUFMAN: Your Honor, at this point I would like to read a stipulation to the jury.

COURT: All right.

MR. KAUFMAN: It has been stipulated, ladies and gentlemen, that if Mr. Pruit were to be called back to the stand to testify, he would testify that on May 9, 1985, he had conducted an interview with Mr. Robert Henderson of the Small Business Administration, the man that just testified earlier. And that during that interview Mr. Henderson, to the best of Mr. Pruit's recollection, at the time he made out a report of that interview Mr. Henderson told him that as of November of 1984, Henderson stated that he basically took the Midwest Knitting file away from Mathews. However Henderson reported that in taking this file away from Mathews he still tried to maintain Mathews as a figurehead within the 8A community. He did not wish to cut away Mathews' credibility and so Mathews remained a mouth piece and ear piece to the 8A Milwaukee community.

Henderson did deal directly with DeShazer [457] regarding his situation, because DeShazer would call him, Robert Miller, and anyone else he felt could help him.

Mr. DeShazer at this point had become desperate over the fact that the advance payments were so late. Henderson assured that DeShazer continued to contact Fred Mathews as well, but it must be emphasized that a definite effort was made to keep Mathews looking like the man in charge of the 8A program.

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EXCERPTS FROM TESTIMONY OF FREDERICK MATHEWS

(R. 38: 465-89)

* * * *

[465] MR. FREDERICK A. MATHEWS, called as a witness and after first having been duly sworn upon his oath, testified as follows, to-wit:

CLERK: Please state your full name and spell your last name for the record.

MR. MATHEWS: Frederick A. Mathews, M-a-t-h-e-w-s.

DIRECT EXAMINATION

BY MR. KAUFMAN:

Q Where do you live, Mr. Mathews?
A I reside at 9633 West Reo, Milwaukee Wisconsin.
Q How long have you lived there?
A Approximately ten years.
Q How long have you lived in Milwaukee?
A Forty-nine years. I was born here.
Q How far did you go in school, Mr. Mathews?
A Twelfth grade, three years of college.
Q Were you ever in military service?
A Yes, I was in the U.S. Airforce for four years.
Q When you left the Airforce, what did you do?
A I was employed at American Motors for a short period while I was still attending college. I was employed at [466] Lowei and Company, stock brokerage firm. Worked at the First Wisconsin, cost accounting. Worked at the Joseph Schlitz Brewing Company before being employed for the Milwaukee, City of Milwaukee. And from there Small Business Administration.
Q You married?
A Yes, I am.
Q How long have you been married?
A Be twenty-five years December 27th.

Q Any children?

A Yes, I do. Two boys and a girl.

Q What are their ages?

A My oldest is, oldest son is twenty-seven—twenty-nine, I am sorry. My daughter is twenty-four. My youngest is nineteen.

Q You know a man named James DeShazer?

A Yes, I do.

Q How long have you known Mr. DeShazer?

A About fifteen years.

Q When did you meet him?

A I first came in contact with Jim DeShazer in the early part of 1970. I was employed as a Business Development Specialist at the City of Milwaukee, Milwaukee Economic Development Corporation. He was part of my portfolio at that time.

[467] Q So at that time you had a business relationship with Mr. DeShazer?

A Right. Part of my responsibility was to make periodic field visits to the individual's place of business, as well as keep their account current so far as collecting the monthly payment on the various loans.

Q At any time after that business relationship began with Mr. DeShazer, did your relationship with Mr. DeShazer change at all?

A Over the period of time from meeting at these various seminars, workshops, having social gatherings, we did have a somewhat of a friendship started based on similarities of sports, conversations about business, and from that our friendship grew. I would say more so than just on a professional level.

Q You served with the Small Business Administration when?

A February 1975.

Q When you started with the Small Business Administration, what was your title?

A At that time we were called Minority Enterprise Representatives. It was primarily responsible for soliciting individuals from the minority community that would have the capabilities to develop business or had the aspiration of starting a new business. We would go out, try to explain the different types of services that [468] was available from the Small Business Administration, and see if we could assist in inducing them to participate in our various programs.

Q Your job description change at some point?

A Over the period of time I was involved in various other divisions such as the management and assistance division, financing and investment division, as well as what I primarily are doing now which is the 8A program.

Q Did you after joining the SBA, did you have business contacts with James DeShazer?

A Yes, I did. In 1979, Jim DeShazer and his brother decided to severence the company and Jim was interested in starting Midwest Knitting. I assisted him in the preparation of a loan application. Not assist, but I worked on loan applications inside of SBA, which entailed quite a lot of meetings to determine the feasibility of the business as well as the validity of some of the documents submitted by the clients.

Q Had you—he became part of your 8A portfolio, is that right?

A Yes, he did.

Q How many people were in your 8A portfolio?

A At that time it was approximately fifteen. At the present time its eleven.

Q Now, of these eleven people in your portfolio, would you [469] say that, would you characterize your relationship with Mr. DeShazer as different from anyone else in your portfolio?

A Yes, I would. Jim DeShazer, from the outset, was under capitalized. He also lacked managerial expertise in a lot of areas. Whereby we had to provide assistance to overcome some of the deficiencies that he encountered.

One would be utilizing the management and assistance division by retaining consultants to assist in alleviating the problems within his operation. We also solicited other agencies to participate by providing equity funding which would be the MESBIC, which Mr. Miller alluded to which stands for Minority Enterprise Small Business Investment Corporation. This was an ongoing responsibility that I participated in with Jim DeShazer to assist in developing his business so we felt that he was in a position to graduate from the program.

Q I guess what I was asking, Mr. Mathews, did you feel that your relationship was any different with Mr. DeShazer than anyone else in the program?

A Well, yes. I also considered the fact that Jim DeShazer and I was personal friends. And I am not the type to discuss my personal likes, dislikes, with each and every person that I come in contact with. But over a period of time we had a little more in common. We enjoyed a [470] lot of the things, such as sporting events. We shared a lot of information that was personal, and I considered him a friend. And I tried to, I would say lean more in assisting him than I did with other clients, such as explaining in greater detail some of the problems, some of the solutions I thought was relative to helping him, and like I said, I just took it on myself to believe that he was a friend of mine and I think in that respect I was a little different as it relates to other 8A clients.

Q Well, because he was a friend would you treat him different in your business relationship than you would other 8A clients?

A No, I would not. I explained that to him any number of times, that my primary function was to provide whatever assistance I could. I would do everything that I could, help for him as well as anyone else, but because of the fact that we were friends it was impossible not to discuss some of his problems when we were socializing. So therefore I just automatically assumed that he might

have assumed that I coud do more, but I tried to explain that everything that I was providing was just what I would do for anyone else in the program.

Q When you talk about taking Mr. DeShazer into your confidence more than the other 8A contractors, what do [471] you mean?

A Well, I would explain to him some of my personal problems such as what the hardships that a person might incur when they have three children, a growing family, some of the aspirations I had in regards to being successful, some of my likes, dislikes, such as entertainment, just general things. And he understood this. He shared with me similarities of his likes, dislikes, his family problems, that type of thing.

Q These things you wouldn't discuss with other 8A contractors?

A No, I wouldn't discuss it, not with just another 8A contractor. I wouldn't discuss with almost anyone, period. But like I say, we were traveling a lot, going to Rockford, Illinois, we had to go to Chicago, different places. You would be couped up for hours, so we just kind of discussed personal things and out of respect our friendship grew, and I had a lot of respect for him, and I felt that some of te things that we had discussed would be private. So I was quite embarrassed that he betrayed this friendship. Like I say, I was born here, and I have a family.

Q When you discussed these things that didn't have anything to do with business?

A Yes.

[472] Q Did you ever make it known to him that your personal things were different from your business life?

A Yes, I would a lot of times. We would discuss them. I would say it was as recent as January I was having family problems and I discussed this with him. There again, I thought he was a friend, and I think he took advantage of the situation by—

Q Okey. Let's go back now to, you have heard some discussion, you have been here through the entire trial,

you have heard some discussion of a loan for fifteen hundred dollars.

A Yes.

Q You recall that?

A Yes.

Q Tell me the circumstances under which that loan was made.

A The loan was made, I believe, in 1983. It came about because the fact that I was discussing my family, the fact that my daughter was going to school in San Bernodino State College, and I had to pay room and board and I told him that I was short of funds to meet certain requirements that she needed, and would he be willing to loan me this money.

Q Okey.

A He accepted that.

[473] Q And he loaned you the money?

A Yes, he did.

Q At any time did you pay any of that money back?

A Yes, I did. We had a relationship whereby we was playing this lottery and I would say, June in '84 I gave him five hundred dollars. The other time would be when I received this letter from him in December, which I did not agree with. I called him right away, and explained to him that I didn't agree with the amount, but I understood the situation that he was under, and I would be willing to give him part of the money. From the time that I received the fifteen hundred up until December, he never indicated that he wanted the money. It was always whenever you have it, fine. Just give it to me. However, in December I called him over and asked him, would he accept four hundred dollars, which he did.

Q After that fifteen hundred dollar loan did you ever borrow anyother money from James DeShazer?

A I did not.

Q Draw your attention to November of 1984, at that time did you have responsibility over James DeShazer's SA file?

A I did not. Mr. Henderson as of January of 1984, he came in to our division. However his primary function at the 8A Program, he was my counterpart in the Chicago [474] Regional office prior to receiving the position of Deputy District Director. So he had extensive knowledge of the 8A Program. As you well know, I was the only one in the State of Wisconsin that had this responsibility. Mr. Miller, Curt Charter, was not familiar with the program. I assumed they requested him to accept this transfer to provide some assistance to me.

He came on board with the authority to override anything I would suggest regarding the 8A clients which he utilized on a daily basis. And my responsibility or delivery of service to Mr. DeShazer. And a number of times he would take cash flow statements, different other forms, and correct them or return them based, or requesting additional information or he would go back to DeShazer and ask for a different document. And he just automatically took over the file to the degree that I felt I was subordinate to him as a clerk, more or less, rather than a business consultant specialist.

Q Was Mr. DeShazer, at any time that you have talked about this, with Mr. DeShazer?

A Well, I am surprised that he didn't explain when he was here, because each time that he came into the office Mr. Henderson would be part of our meetings, and at those meetings he would take control. He would explain [475] exactly what he wanted before pursuing any further in regard to the advance payments or anyother assistance that we provided. He also contacted Mr. DeShazer direct, a number of calls in the morning, in the evening, a lot of calls from our office, and as he stated, there would be conference calls. It would be myself, Mr. Henderson, Mr. DeShazer, and possibly two or three other parties from the Chicago regional Office. But he was directly involved with his case, I would say from that period on. And Mr. DeShazer was aware of this because he would call in himself without calling the

Milwaukee office. He would call Mr. Henderson in Madison. He would call individuals in the Chicago Regional Office. He knew exactly where to go for whatever assistance he needed. Mr. DeShazer had been in the program longer than a lot of other contractors and he understood what was required and where to go to get the information he needed. And he also knew that I was limited in regard to what I could do for him.

Q All right. I want to draw your attention now to February 27, 1985. You recall a meeting with Mr. DeShazer on that date?

A Yes, I do.

Q Tell us what happened at that meeting.

A Mr. DeShazer and I met at the Hyatt. At this meeting he [476] approached me with the proposition that he had $12,000.00 or was going to receive $12,000.00 from an individual in Chicago. He said that he needed $7,000.00 of this amount of money to apply toward a mortgage or something to do with his house. He indicated to me that because we were friends, because he knew that I was probably still having financial problems, he would be willing to loan me the difference.

Q Did he—why would he say that you might be having financial problems? Had you discussed that at all?

A Yes. I had discussed again, I thought he was a friend of mine, I explained to him that I was having problems in regard to my PMAS. I had been evaluated as being not acceptable. I didn't understand why, and I explained that I had wanted a letter explaining what type of support that I have given all the 8A contractors. He seemed reluctant. And I explained that my superior, Mr. Miller, had recommended termination unless I could overcome these deficiencies. I also explained that I had retained the services of an attorney to rebut those allegations.

Also explained to him the situation that with my wife, that we were separated, she was not living at home. I had other financial needs in regard to eating out. I didn't

have all the skills as far as keeping the [477] house going, and I still had tuition to pay, and he understood that.

At no time did I ask him for a loan or anything. This is ongoing conversation. There again, I said he was a friend. I looked to him just to discuss this with, and he appeared to understand that.

Q Okey. So let's go back to the meeting, then, on February 27th. At any time during that meeting did you ask him for money?

A No, I did not.

Q It was proposed that you said that he gave you some money.

A Yes.

Q How was that proposed?

A He said that like I said, a friend of his in Chicago was supposed to provide some twelve thousand dollars that he had.

Q Where did he say the money was in?

A In his garage. I didn't believe, first of all, that he was going to receive that amount of money from a friend. There again, I didn't question it, primarily because I didn't solicit any loan or anything, so I didn't think it was important at that time to pin him down to anything specifically.

Q Why did he say he had it in his garage, you ask? [478] A Well, I didn't have to ask. He made the statement to the fact that he didn't want his wife to know about the total amount, because he only needed seven thousand dollars, and he felt that it would cause some problem if she knew the total amount.

Q Did you make any arrangements at that meeting for him to give you this loan he proposed?

A I did not.

Q Well, did you ever discuss it again with Mr. DeShazer?

A I think a couple of weeks elapsed before he contacted me again regarding the loan. He brought it up several times, I would say. In fact he indicated that he still had the money.

Well, I was still interested in it, and I still didn't believe that he had it, because these different invitations would stop and start without me pursuing it. And I just left it up to him. But I indicated that I was still financially strapped, and I guess from that he understood that more than likely I would accept a personal loan.

Q Did you tell him you would accept it?

A Yes, I let him know that I was in need of funds, and I had accepted a loan previously, but I explained as well that it had to be personal, and that at no way would it, you know, interfere with my job. I explained that I was [479] quite embarrassed, and I didn't want anybody to know.

Q Embarrassed about what?

A The fact that he, well, just my position in the community, the fact that my job, the status that it requires, you know. You want to be considered or accepted as being a successful person, and so many things were not in place and I was embarrassed, felt that.

Q Did you have any talk about, you said he mentioned it a number of times. Did you ever discuss it, this loan, in detail at any later date?

A The only time after that that it was in detail would be when he called, I believe it was on the 8th.

Q How do you know it was on the 8th?

A The tapes that we heard here, the transcripts that were circulated.

Q Okey.

A He called on the morning of the 8th of April, I believe, and wanted to set up a meeting. I explained to him that I had to pick up my car after work, and he made the offer to drive me to the filling station. I said that I would be glad to meet with him at the Hyatt, and he agreed to meet me at four-thirty. At four-thirty I approached his car, it was approached adjacent to Major Goolsby, went by expressway to Fond du Lac Avenue. At [480] approximately 58th and Fond du Lac. I got out

of the car. On the way, of course, we discussed nothing but general things.

Q Before you got out of the car you heard the conversation?

A Yes.

Q Right? You heard the taped conversation?

A Right.

Q You heard what you said?

A Yes.

Q Right after you told him to pull over?

A Yes.

Q Explain that.

A On the way up he made the overtures again, and I, he still was, well, he still was not satisfied that his advance payment and his loans with the bank was not handled right. I did not agree with this, because we had discussed this any number of times. I tried to explain that everything was in place. He was aware of this because of the various documents that he had to submit, sign, transmit, to the Chicago Regional Office. I explained that everything was in place, yours is coming. All you have to do is wait. The contracts have been approved, signed, forwarded to Chicago. The advance payment had been approved, signed over to the [481] Chicago Regional Office. The requests for advance payments have been made. The funds have been transmitted to the Federal Reserve Bank in Chicago. He knew.

Q Did you really think that he was going to get money, the advance payments?

A Of course, they were, had already been negotiated, processed. He didn't have to do anything at that particular time, but wait. Now, when I say anthing, I am talking about the facts of SBA. We did put stipulations on the disbursing of those funds that related to his problem with his creditors, his delinquent status with IRS, and additional information that the bank requested.

Q All right. This particular statement after you pulled up to the service station that you made after the

car was stopped, you said something to the effect what can you do for me. You recall that statement?

A It wasn't exactly that. I was tired of the different overtures he was making about the loan. I wanted to know whether or not he was going to loan me the money. If not, forget it. I explained that I would still be willing to accept it as a personal loan, and if he was going to do it, do it. That is basically what I meant in that statement.

[482] Q You then later, I guess later, I mean, refer you to April 23rd, you heard a tape of a conversation that you had on that date?

A Right.

Q Can you tell me what happened inbetween the conversation in the car and the conversation on April 23rd between you and Mr. DeShazer regardig the loan?

A Well, on the conclusion of our meeting in the car, I stated that I would meet him tomorrow, or I would call him and then I felt that he probably was not telling the truth about the loan. I didn't call. I didn't bring it up any more. And even though we had meetings where we had to still discuss a pending contract, that was the small arms case, I didn't think that he had any money or whatever. We met, or was a scheduled meeting supposed to take place on the 23rd. I didn't call him, and I believe he called me that night of the 23rd, and we discussed business as usual. And on the conclusion of that conversation he asked me again, are you interested in the loan? And I said that I was. And I said I would meet you tomorrow at lunch or something to that effect.

Q All right. Did you meet him at lunch the next day?

A Again I still felt that this was just another overture. I didn't call him the next day, but at nine o'clock or approximately in the nine, ten o'clock in the morning, [483] he called, asked me to meet him at the name of a bar, I think it was Ben's Den, that is directly across the street from his place of business.

I was tied up in other work. I couldn't make the meeting. And I felt that he was still making these overtures,

but not really sincere about the loan, and I didn't meet him.

He called again about ten-thirty, eleven o'clock, he wanted to meet me for lunch again. I still didn't think that he was sincere about it. I didn't meet him for lunch.

Q Why not?

A Well, I just felt that he was not sincere, not really going to make the loan or whatever. And I had already made arrangements as well as I think it was secretary's week or something to that degree, we were all going out to lunch together.

Q Did you take your secretary out to lunch?

A Well, it was not just one, it was approximately ten of us went out to lunch together.

Q When you got back from lunch, what happened?

A When I got back from lunch he called again several times. One time I don't believe he was at his place of business. He asked me to meet him. I couldn't because I had another commitment in the office. I received [484] another call. He said he was at the Pfister. He had this document from Paul Schmidt, from the IRS, and he wanted to know whether or not I would be willing to pick it up, because it was important to get transmitted to our Chicago Regional Office. I told him on the phone that I did not have a lot of time, but I would be willing to come up there because I knew how important the document was. I went up to the Pfister to pick up this repayment plan that he had established with the IRS.

Q And you went to the Pfister?

A Yes.

Q You heard the tape of the conversation that you had at the Pfister?

A Yes.

Q While you were having that conversation he gave you an envelope with some money in it?

A Yes.

Q You accepted that?

A Yes.

Q Explain what happened when you were at the Pfister.

A When I came into the Pfister, he was sitting at one of the booths. He was eating. I didn't think it was lunch because it was two-thirty, three o'clock, and I set down and I asked him for the letter. He gave me the letter. [485] Well, then he started the conversation about processing documents, which I didn't know why he was bringing it up again, but I understood because he had been out of, his place had been closed down, and I felt that he was emotional. I understood because, or at least I tried to, because I was a friend. So I didn't challenge him on whether or not he was expecting me to do anthing different, because I had already explained to him in the past that everything had been processed. So I kind of just let him rant or rave on, if you excuse the word. But it didn't make any sense to me, but I was in a hurry, and like I said, I was trying to pacify him, because he head been out of work. The place had been closed down for more than a year. So I just was going to agree with what he said to get out of there. And I was more interested in the letter. And like I said before, he brought up the loan again, and at that time he said I have it here and I accepted it. But there again it was always my intention that it was a personal loan. I never did commit any crimes. So I didn't think that it was breaking the law. Hindsight, I never would have accepted anything from him, but that is hindsight.

Q You have heard some testimony about SOP's in your job?

A That's right.

Q Are you familiar with those?

[486] A Somewhat.

Q Are you familiar with your work rules regarding taking, accepting loans, gratuities from people that you do business with?

A Yes, when you—

Q Let me finish my question.

A All right.

Q At the time that you agreed to take this loan from Mr. DeShazer, did you have an understanding of what those rules were with regard to taking loans?

A Yes, I did.

Q What was that understanding?

A It was acceptable if it was personal, and it did not entail doing anything other than what was required on your job. And that was the understanding that DeShazer and I had. We had discussed it any number of times and I explained to him that it had to be personal, private, and otherwise.

Q And that last conversation with Mr. DeShazer about a lot of things that he wanted to have understood with you, you remember that?

A Yes. And it didn't make sense to me, because as I said before, everything that I possibly could do had been done. It did not entail me to do anything more than what I would do for anyother 8A contractor. So I didn't [487] understand what he was talking about.

Q Well, you understood what he was saying.

A Well, I didn't understand why he was bringing it up at this time before we had already went over that so many other times.

Q You told him you would shake on your end, shake on his?

A Well, I was a friend, I was trying to relieve his tension, his problems, I wanted to get out of there. I didn't want to stay with the continuation of the conversation because it didn't make sense because like I said before, I had done everything for him, and I felt that as a friend he understood that, and there was nothing else that he could expect at that time, so I didn't really understand why he was still bringing up this processing of papers and that.

Q You thought it was a law to take these things without, even if it was long as it was for personal things?

A Yes, as long as it was a personal loan.

Q I whink we heard the tapes a number of occasions that you tell him you didn't want anybody to know about it?

A Yes.

Q Why is that?

A Like I said, I was born here, I am well known, I was embarrassed about the situation, and I just felt that I didn't want anyone to know whether it was a personal [488] friend, my supervisor, co-workers, anyone.

Q Why didn't you want your supervisors to know about it?

A No.

Q Why not?

A Possibly could misconstrued regarding doing something more than what I would primarily do. I there again, I thought it was private, personal. I explained that to Mr. DeShazer.

Q One last thing, Mr. Mathews. You have listened to the tapes a number of times, right?

A Yes.

Q Read the transcripts of those tapes a number of times?

A Right.

Q And specifically the meeting, in that last meeting in the Pfister, right?

A Yes.

Q On hindsight, I think you testified to this before, on hindsight would you say that when you accepted that money you should have known whether what Mr. DeShazer was offering it for?

A Now that I have heard the tapes, and the conversations that he was making, I can see that he had other things in mind, other than loaning me the money. I didn't know where he was going. I didn't have the liberty of

knowing that he was upset about our friendship, or the [489] fact that he was not a friend or that he would be orchestrating a trap or whatever, but there again like I said, I thought he was a personal friend and it was bad judgment on my part, but I wouldn't do it to commit a crime, no.

Q At any time when you accepted that money, did you in your own mind, believe it was being given to you because you were an SBA official rather than a personal friend?

A I did not.

MR. KAUFMAN: I have no further questions.

* * * *

TRIAL COURT'S DENIAL OF MOTION FOR MISTRIAL ON ENTRAPMENT ISSUE

(R. 38: 623-24)

* * * *

[623] COURT: All right. As the Court has previously indicated, the Court feels that the rule in the 7th Circuit is an appropriate rule, and is one that this Court should and must observe, and under those circumstances the Court had previously denied the request of the defendant to use the entrapment defense, and having elected, as the defendant did, to deny the intent and the other elements in the defense, the Court did feel that to give an instruction as to entrapment would be error, and on that basis alone the Court denied the request for the entrapment instruction.

The Court also did permit defendants to proceed with the theory, at least, that the acts of the defendant were procurred by the overt acts of this principle witness of the Government, Mr. DeShazer, and to develope that as a part of their first line defense.

The Court is somewhat of the opinion that the evidence is shaky at best, with respect to the second [624] defense of entrapment, but having previously ruled that the 7th Circuit rule is applicable to this case, the Court does not find it necessary to reach the second question of counsel, namely that there is sufficient evidence here to establish an entrapment defense or instruction to that effect.

The Court does feel that it would normally require more evidence than what is presently in the record on which to predicate an entrapment instruction.

* * * *

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 85-2904

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

FREDERICK MATHEWS,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 85 CR 63—THOMAS J. CURRAN, *Judge*

ARGUED JUNE 12, 1986—DECIDED OCTOBER 9, 1986

Before BAUER, *Chief Judge*, and COFFEY and RIPPLE, *Circuit Judges.*

BAUER, *Chief Judge.* The defendant, Frederick Mathews, was convicted of receiving money as an official of the Small Business Administration in violation of 18 U.S.C. § 201(g). He appeals, alleging three grounds for reversal: that the district court erred by refusing to allow Mathews to claim entrapment unless Mathews admitted all elements of the crime, including the element of intent; that the district court erred in excluding for cause several veniremen who expressed disapproval of tape recording conversations without the knowledge of all parties; and that the district court erred in denying Mathews' motion for a mistrial based on the prosecution's use of peremptory strikes to remove all black veniremen from the jury. We find the district court committed no error and affirm its judgment of conviction.

I.

Mathews was employed in the Milwaukee office of the Small Business Administration ("SBA") as a Business Development Specialist in charge of the "8A Program." The 8A Program is designed to aid small businesses owned by socially and economically disadvantaged concerns. Applicants for the 8A Program become clients of the SBA. With the SBA serving as primary contractor and the 8A client acting as subcontractor, the SBA attempts to procure government contracts on behalf of 8A clients and to help them perform on the contract.

The charge of which Mathews was convicted concerns Mathews' relationship with James DeShazer. DeShazer is the president and owner of Midwest Knitting Mills. Midwest Knitting Mills was a participant in the 8A Program and obtained several contracts through the SBA. Mathews was DeShazer's main contact at the SBA.

The evidence at trial showed that Mathews accepted loans from DeShazer (Mathews says two, the government says more). Mathews claims the loans, including the loan involved in this case, were personal loans from DeShazer unrelated to Mathews' duties at the SBA. The government and DeShazer claim the loans were gratuities required by Mathews to obtain his cooperation in SBA matters.

In support of its theory, the government introduced evidence that include tape recordings of conversations between Mathews and DeShazer discussing the loan that resulted in Mathews' arrest and prosecution. These conversations had been covertly taped by DeShazer under the direction of the FBI which began investigating Mathews in response to a complaint by DeShazer to a Navy purchasing agent regarding Mathews' repeated requests for loans.

The jury believed the government's version of the facts and convicted Mathews of the charge of accepting a thing of value as a public official for an official act to be per-

formed by him, a violation of 18 U.S.C. § 201(g). The trial judge entered judgment accordingly and sentenced Mathews to three years probation, the first two years to be served under house arrest. Mathews appeals.

II.

Mathews claims the trial court erred in denying his motion *in limine* to present evidence on the defense of entrapment. Mathews asks us to reconsider the rule in this circuit that requires a defendant who wishes to plead entrapment to admit all elements of the crime, including the element of intent. *United States v. Rodgers*, 755 F.2d 533, 550 (7th Cir. 1985), *cert. denied*, 105 S.Ct. 3532 (1985). He acknowledges that this rule is in accord with the Third, Sixth, and Tenth circuits, but argues that a better rule would require a defendant to admit only the acts of a crime, not the intent, before being allowed to plead entrapment. Mathews cites cases from the First, Fifth, and D.C. circuits as examples of decisions that follow this rule. *United States v. Caron*, 588 F.2d 851 (1st Cir. 1978); *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984) (*en banc*); *United States v. Kelly*, 748 F.2d 691 (D.C. Cir. 1984). Mathews does not ask us to go so far as those circuits that he claims allow a defendant to deny all elements of the crime and at the same time plead entrapment. *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975); *Crisp v. United States*, 262 F.2d 68 (4th Cir. 1958).

Although we acknowledge some diversity of opinion among the circuits, we see no reason to change our rule requiring a defendant to admit all elements of the crime before being allowed to plead entrapment. When a defendant pleads entrapment, he is asserting that, although he had criminal intent, it was "the Government's deception [that implanted] the criminal design in the mind of the defendant." *United States v. Russell*, 411 U.S. 423, 436 (1973); *United States v. Rodgers*, 755 F.2d

533, 550 (7th Cir. 1985). We find this to be inconsistent *per se* with the defense that the defendant never had the requisite criminal intent. We see no reason to allow Mathews or any defendant to plead these defenses simultaneously.

III.

Mathews also complains that the exclusion for cause of several veniremen who expressed misgivings about covert tape recordings created a jury skewed in favor of the government and underrepresentative of the community. He argues that the trial judge should have conducted a more extensive inquiry into the basis for the veniremen's objection to such evidence in order to ascertain whether the veniremen felt they could give the evidence its proper weight despite their initial reservations.

We disagree with Mathews for two reasons. First, a trial judge's questioning during *voir dire* is subject to limited review. In light of the special circumstances of the situation (to be outlined below) and the great deference that we accord trial judges in this area, *Wainwright v. Witt*, 83 L.Ed.2d 841, 844 (1985), we see no reason to overturn the judgment of the trial court on the basis of the exclusion of these veniremen. Second, the trial judge called a side bar during *voir dire* to give Mathews' counsel the opportunity to suggest an appropriate route for the trial court to take regarding these veniremen. Mathews' counsel expressed no objection and asked the court to proceed as it had been before the side bar. We find it difficult to accept Mathews' belated allegations on appeal that the judge's action taken at Mathews' request denied him his sixth amendment right to an impartial jury representing a cross-section of the community.

A.

The trial judge was forced to deal with a difficult and all too common situation during *voir dire*. The court had properly and methodically questioned the veniremen as

a group about their limitations and biases regarding the case. After its first twenty-two questions, the court had excused only six persons for cause. The court's twenty-third question inquired whether the veniremen had "any concern about tape recording conversations when one party is not aware that it is being recorded." (Trial Transcript at 43). One venireman expressed concern, and the court requested her in depth about whether her reservations about the evidence-gathering method would interfere with her ability to weigh that evidence, whether she still had reservations knowing that she would only hear the tapes if they were found admissible by the court according to the rules of evidence, and whether her reservations would remain regardless of the nature of the investigation. When the venireman continued to express doubt, the judge dismissed her.

As acknowledged by counsel for both sides, what followed was a classic case of potential jurors jumping on the opportunity to avoid jury duty by suddenly realizing that they too shared the bias of the venireman just dismissed. Several veniremen immediately brought their newly discovered problem with accepting covert tape recordings to the attention of the trial judge. The judge dismissed the first bandwagoner without further questioning, knowing the venireman had heard the examination of the venireman just dismissed. The judge dismissed the second and third followers after they offered short explanations of the basis for their objections to taping. When a fourth venireman suddenly discovered a deep-seated distaste for covert taping, the judge questioned her in depth and reiterated that tapes might not even be introduced into evidence and would only be heard if they were found admissible according to the rules of evidence. The venireman then relented, declared she could give the evidence appropriate weight, and was retained on the panel. Undeterred, a fifth venireman took up the mantle and voiced objections to covert taping. The court was examining him further when still another

venireman interrupted with questions regarding the nature of the tapes.

Seeing the direction that the *voir dire* was going, the judge called a side bar. As represented to this court at oral argument by both counsel (both of whom also served as trial counsel), the judge asked both parties for their preferences as to the appropriate manner for the court to deal with this mass exodus of potential jurors. Mathews' counsel admits that he did not object to the actions that the judge had taken up to that point and in fact encouraged him to continue.

The judge then dismissed the venireman he had been questioning and dealt with the remaining four veniremen who claimed that they too disliked covert taping. The judge questioned the first three of these four in depth, released one and kept two. The final objecting venireman was also released.

With the supply of potential jurors now exhausted, the court called a recess. The following day, the new veniremen expressed no misgivings about taping, and the *voir dire* proceeded without further problem.

B.

We see nothing wrong with the trial judge's conduct of the *voir dire*. At least six times, the judge conducted in depth questioning in front of the panel of veniremen as a group regarding the level of bias necessary to demonstrate cause for being excused from jury duty, bias that must remain regardless of the rules of evidence and the instructions of the judge. The judge need not, as Mathews contends, in every case question each juror individually regarding each possible area of prejudice. We review the *voir dire* only to see "whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present." *United States v. Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). We "will not find that a trial court abused its discretion in conducting voir dire

where there is 'sufficient questioning to produce, in light of the factual situation involved in the particular trial, some basis for a reasonably knowledgeable exercise of the right of challenge.'" *United States v. Hastings*, 739 F.2d 1269, 1273 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 1199 (1985) (citations omitted). We may only reverse a trial judge's decision on exclusion of veniremen for cause if it is a "clear case" of prejudicial error. *Wainwright v. Witt*, 83 L.Ed. 2d 841, 844 (1985). The judge's conduct easily satisfies this limited standard of review, and we accordingly decline to disturb the trial court's decision.

Furthermore, Mathews had every opportunity to object during *voir dire* and failed to do so. The judge even asked the parties how they wished him to proceed in light of the developing problem with the veniremen's bias regarding covert taping. Mathews, by his counsel, encouraged the judge to continue as he had been before the side bar, which the judge did. This is clearly a waiver and more of whatever right Mathews may have had to object to the conduct of the *voir dire*.

Finally, we feel compelled also to note that we are uncertain what harm Mathews could claim even if the conduct of the *voir dire* would have been improper. The judge did not fail to exclude for cause a venireman that Mathews wished excluded (which would have forced Mathews to use a peremptory strike and thus potentially prejudice his case), and the trial judge did not conduct the *voir dire* so that a venireman who may or may not have been prejudiced remained on the panel (which would have resulted in the same harm). Instead, the judge immediately excluded veniremen who expressed some bias against the government without first questioning them further on an individual basis. We are doubtful whether this harmed Mathews in any way or whether any harm that did result can be the basis of a sixth amendment challenge. As stated by the Ninth Circuit in addressing a situation in which the appellant contended that the trial

judge had erred in excusing two jurors for cause on his own motion:

> Moreover, regardless of the propriety of excusing two veniremen, we would not be inclined to reverse. The defendant is entitled to an array of impartial jurors to whom he may direct his peremptory challenges but, having been provided with such a panel, he suffers no prejudice if a juror, even without sufficient cause, is excused by the Court.

United States v. Calhoun, 542 F.2d 1094, 1103 (9th Cir. 1976), *cert. denied sub nom., Stephenson v. United States*, 429 U.S. 1064 (1977).

IV.

Mathews also contends the trial court erred in denying his motion for mistrial based on the prosecution's use of its peremptory strikes to exclude all blacks from the jury. We disagree.

A.

The Supreme Court recently addressed this issue in *Batson v. Kentucky*, 106 S.Ct. 1712 (1986), and the principles elucidated there control this case. In *Batson*, the court established that "the State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause," *Batson*, 106 S.Ct. at 1718, and "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 1719. When a defendant alleges the prosecution has used its peremptory challenges in a discriminatory fashion, therefore, the general principles of Equal Protection apply. *Id.* at 1719.

The burden is on the defendant initially to make "a *prima facie* case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an in-

ference of discriminatory purpose." *Id.* at 1721. To make this showing, it is not necessary for the defendant to show that the prosecutor's actions in past cases have demonstrated a pattern or practice of discriminatory use of peremptory challenges. *Id.* at 1720-21. "A defendant may establish a *prima facie* case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* at 1722-23. Then, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used [peremptory challenges] to exclude the veniremen from the petit jury on account of their race." *Id.* at 1723. These "relevant circumstances" may include a pattern of peremptorily striking black jurors, the prosecution's questions and statements during *voir dire*, and the prosecution's statements and actions in exercising his peremptory strikes. *Id.*

If the trial judge determines that the defendant has made a sufficient *prima facie* showing, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 1723. Although "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause," *Id.* at 1723, "the prosecutor may not rebut the defendant's *prima facie* case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." *Id.* Neither may the prosecutor satisfy his burden "by denying that he had a discriminatory motive or 'affirming his good faith in individual selections.' " *Id.* at 1723 (citations omitted). The prosecutor's explanation must be "clear and reasonably specific," it must contain " 'legitimate reasons' for exer-

cising the challenges," and it must be "related to the particular case to be tried." *Id.* at 1723 n. 20.

The defendant, of course, bears the ultimate burden of proving intentional discrimination. *Id.* at 1721 and 1723-24. The duty to determine whether such a showing has been made is entrusted to the sound discretion of the trial courts who are "experienced in supervising *voir dire*." *Id.* at 1723.

For purposes of review on appeal, *Batson* reminds us that " 'a finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court," and that, "[s]ince the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Id.* at 1724 n. 21. Thus, we may only reverse the trial judge's determination that the prosecution's peremptory challenges were not motivated by intentional discrimination if that determination is clearly erroneous. *United States v. Tucker*, 773 F.2d 136, 142 (7th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3863 (1986).

B.

Applying these principles to the facts here, we have no doubt that the trial court properly denied Mathews' motion for mistrial based on the prosecution's use of peremptory challenges.[1] The judge's inquiry was careful and thorough, and his underlying findings were reasonable and consistent. The trial court's ultimate finding that the government did not intentionally discriminate when exercising its peremptory challenges cannot be said to be clearly erroneous.

---

[1] Because we find the trial judge's conduct of the proceedings below satisfies *Batson's* requirements, we need not (and expressly do not) decide whether *Batson* applies retroactively to this case. *See Allen v. Hardy*, No. 85-6593, 54 U.S.L.W. 3856 (June 24, 1986) (*Batson* does not apply retroactively to collateral attack on conviction).

The trial judge, without the benfit of *Batson*'s specific guidelines, undertook a thorough inquiry in response to Mathew's pre-trial motion challenging the government's use of its peremptory challenges to remove all blacks from the jury. After listening to Mathews' objection outside the presence of the jury, the judge asked the prosecutor for her response. The prosecutor then explained in some detail the basis for each of her strikes against the three black veniremen. We recount it here in full as an example of the type of explanation that satisfies *Batson*'s requirements that such explanations be clear and reasonably specific, contain legitimate reasons, and be related to the particular case.

> I did have reasons. The choice that I made this morning was an unusually difficult one, and as [defense counsel] is probably aware, the gentleman, one of the gentlemen who was among the people that I just mentioned, was my last strike, and one over which I hesitated at some length. It is always very difficult to describe your reasons why you choose or do not choose a juror. When you read cases that say you are supposed to tell what your reasons are, I think this must be written by people who never tried a case, but I will do the best I can.
>
> With respect to the lady, Mrs. Switzer, she was [among] those people who indicated a grave reservation with respect to her ability to adequately look at and appraise the tape recording evidence, and she along with the other people who had raised similar objections yesterday, I struck for, I think probably self-evident reasons, that type of evidence is going to be important to my trial and I believe that it will be very difficult for me to get a fair hearing on my side of the case if there are people who just plain believe that its not right under any circumstances no matter what the judge should instruct them.
>
> With respect to Ms. Phenix, I noted this morning when I came into the courtroom, I thought yester-

day afternoon, as a matter of fact, that I would like to keep her. She is a sort of basic Milwaukee person on paper at least, what we know of her. This morning she was late in coming, she was not the only one, but she was among people who [arrived] after two o'clock this afternoon when the jury was supposed to be here in their seats. And this indicated to me a lack of commitment to the importance of this proceeding. That was one of the reasons why I felt that given a choice between Ms. Phenix and another juror, I would select a juror who evidenced more of a commitment.

In addition to that, while watching her in the courtroom she did not seem to be attentive to the proceedings at hand. I know this is always very difficult to judge these things on the basis of such a short exposure to a person, but that was my impression of her. That is the reason why I decided to strike her.

My last strike as I mentioned a few moments ago, was Mr. Robinson. I believe that is his name, Declinton Robinson. The reason why I struck him is [admittedly a personal] one. I don't know what is going to happen to me if I put this on the record, but I am going to anyway because the Court needs to know my reasons.

Mr. Declinton was sitting directly to my right, only a space of approximately four feet from me, and both yesterday and today he spent a very great deal of time in examining me in a way which I felt was in the end becoming rather hostile. Now, I realize that this is a subjective judgment, but it was very marked to me, Judge. It was something that I noticed and felt was rude for one thing, and indicated one of two things, either he was going to be very strongly in support of my position or he was going to be very strongly against my position. Under those circumstances I felt that there were other jurors who more fit the profile of a juror that I was looking for.

> There is always a thousand other things, but I feel that at least this much should be placed on the record at this point because I feel that it would have been to my advantage, rather than my disadvantage to have had black jurors on this particular jury, because my witnesses, too, your Honor, my most important witness, Mr. James DeShazer, is like Mr. Mathews, black, and I feel that it is important that he get a fair hearing, so I gained nothing. I gained nothing. I have to select my jurors one at a time, as I see it and those are my reasons.

Trial Tr. pp. 83-86. Following this explanation, the judge asked Mathews' attorney for his response, and he pointed out that other white jurors had also been late but had not been struck by the government.

The judge then proceeded to weigh the factors put forth by both sides as well as other surrounding circumstances. The judge stated that he agreed that the first venireman struck had given particularly hesitant responses to the judge's inquiry following the venireman's initial objection to covert taping and that the peremptory strike was "well justified." With regard to the second black venireman struck, the judge also agreed that the person had demonstrated a pointed disinterest in the proceedings evidenced not only by her tardiness but also by her posture and demeanor. With regard to the third venireman struck, the judge noted that the prosecutor's explanation was subjective and not based on factors that the court had also observed but that this did not necessarily undermine her explanation. The court then considered the explanation in light of other surrounding circumstances. The court noted that the key witnesses for both sides in this case were black, which would discount any advantage that a discriminating prosecutor might perceive in striking blacks from the jury. The court noted that there was no evidence that the prosecution had maintained a pattern or practice of striking blacks from juries in cases where the defendants are black, and further commented that the court's per-

sonal experience showed the contrary. Finally, the court noted that the demeanor of the prosecutor while exercising her peremptory challenges and the time that she took in so doing indicated that she was not simply striking venireman because they were black but was engaging in a careful process of deliberation based on many factors. In light of all of these circumstances, the judge denied Mathers' motion for mistrial.

The judge's inquiry fits easily into the format established in *Batson*. In his motion, Mathews put before the court the facts that he is black (a cognizable racial group) and that the prosecution used peremptory challenges to strike members of his racial group from the jury. Mathews also noted that the government eliminated all blacks from the jury, not just a few, as additional evidence of the prosecution's discriminatory motive. Although we need not so decide, the trial judge apparently treated this as sufficient *prima facie* evidence of the government's discriminatory intent in exercising its peremptory challenges. The judge then gave the prosecution a chance to rebut this inference with a neutral explanation for challenging the black veniremen. This the government did with an explanation that contained legitimate reasons, was clear, was reasonably specific, and was related to the particular case. The judge, after hearing Mathews' response to that explanation, considered all relevant circumstances and ruled that Mathews had not carried his ultimate burden of proving discriminatory intent.

The judge's inquiry was based on the proper criteria as established in *Batson*. We see no reason to overturn as clearly erroneous the judge's denial of Mathews' motion for mistrial.

V.

In sum, we find it was not error for the trial judge to require Mathews to admit all elements of the crime including intent before allowing him to plead entrapment, it was not error to exclude for cause several veniremen who expressed misgivings regarding the use of covert

tapings, and it was not clearly erroneous for the judge to deny Mathews' motion for mistrial based on the prosecution's alleged discriminatory use of peremptory challenges. The decision of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 29, 1986

Before

HON. WILLIAM J. BAUER, *Chief Judge*
HON JOHN L. COFFEY, *Circuit Judge*
HON. KENNETH F. RIPPLE, *Circuit Judge*

No. 85-2904

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FREDERICK MATHEWS,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin

No. 85 CR 63—Thomas J. Curran, *Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by the attorneys for defendant-appellant, no judge in active service has requested a vote thereon, and all of

the judges on the original panel have voted to deny the petition for rehearing and suggestion for rehearing *en banc*. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be and the same is hereby, DENIED.

149

SUPREME COURT OF THE UNITED STATES

No. 86-6109

FREDERICK MATHEWS,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the
United States Court of Appeals
for the Seventh Circuit

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to question I presented by the petition.

March 30, 1987

(5)

Supreme Court, U.S.
FILED
MAY 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-6109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FREDERICK MATHEWS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTION PRESENTED FOR REVIEW

May a criminal defendant use the entrapment defense when he admits committing all of the acts constituting the offense charged but denies possessing the requisite criminal intent?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
CITATIONS TO OPINIONS IN COURTS BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
ARGUMENT	9
THE FIFTH AMENDMENT PROHIBITS COMPELLING A CRIMINAL DEFENDANT TO ADMIT ANY OF THE ELEMENTS OF THE OFFENSE	9
A. This Court's Decisions Clearly Allow A Defendant To Use The Entrapment Defense When He Admits The Acts But Denies The Criminal Intent, As Did Mathews In The Instant Case	9
B. In Addition To Conflicting With This Court's Holdings, The Seventh Circuit's Insistence That Mathews Concede His Guilt Before He Can Claim Entrapment Violates Mathews' Constitutional Rights Under The Fifth Amendment	12
C. The Conflict In The Circuits Results In Differing Applications Of The Entrapment Defense From Circuit To Circuit	16
CONCLUSION	24

TABLE OF AUTHORITIES

CASES

Page

Crisp v. *United States*, 262 F.2d 68 (4th Cir. 1958) 21
Eastman v. *United States*, 212 F.2d 320 (9th Cir. 1954)..... 12, 20
Griffin v. *United States*, 380 U.S. 609 (1965) 14
Hampton v. *United States*, 425 U.S. 484 (1976)..... 10
Hansford v. *United States*, 303 F.2d 219 (D.C. Cir. 1962) (*en banc*) 17
Kinsella v. *United States ex rel. Singleton*, 361 U.S. 234 (1960) 10
Munroe v. *United States*, 424 F.2d 243 (10th Cir. 1970) (*en banc*)..... 22
Ortega v. *United States*, 348 F.2d 874 (9th Cir. 1965) ... 12
Sherman v. *United States*, 356 U.S. 369 (1958).... 9, 10, 11
Simmons v. *United States*, 390 U.S. 377 (1968)..... 14
Sorrells v. *United States*, 287 U.S. 435 (1932) 9, 10, 11, 12, 21
Ware v. *United States*, 259 F.2d 442 (8th Cir. 1958)..... 16
United States v. *Annese*, 631 F.2d 1041 (1st Cir. 1980) 15, 18
United States v. *Barrios*, 457 F.2d 680 (9th Cir. 1972) .. 22
United States v. *Caron*, 588 F.2d 851 (1st Cir. 1978).... 18
United States v. *Demma*, 523 F.2d 981 (9th Cir. 1975) (*en banc*)..... 10, 13, 15, 19, 20, 21
United States v. *Dorta*, 783 F.2d 1179 (4th Cir. 1986)..... 20, 21, 22
United States v. *Eastman*, 212 F.2d 370 (9th Cir. 1954)..... 12, 20
United States v. *Hendricks*, 456 F.2d 167 (9th Cir. 1972) 22
United States v. *Henry*, 749 F.2d 203 (5th Cir. 1984) (*en banc*)..... 15, 17
United States v. *Hill*, 655 F.2d 512 (3d Cir. 1981).. 10, 20, 22
United States v. *Johnston*, 426 F.2d 112 (7th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971)..... 12
United States v. *Kelly*, 748 F.2d 691 (D.C. Cir. 1984).. 16, 17
United States v. *Liparota*, 735 F.2d 1044 (7th Cir. 1984) 13
United States v. *Mathews*, 803 F.2d 325 (7th Cir. 1986) 1, 10, 12
United States v. *Mitchell*, 514 F.2d 758 (6th Cir.), *cert. denied*, 423 U.S. 847 (1975) 22
United States v. *Mora*, 768 F.2d 1197 (10th Cir. 1985) (*per curiam*), *cert. denied*, 106 S. Ct. 856 (1986)..... 10, 20

Table of Authorities Continued

Page

United States v. *Nicosia*, 638 F.2d 970 (7th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981) 13, 20

United States v. *Prickett*, 790 F.2d 35 (6th Cir. 1986) 10, 20, 22

United States v. *Rivera*, 778 F.2d 591 (10th Cir. 1985) .. 22

United States v. *Rodgers*, 755 F.2d 533 (7th Cir. 1985) 12, 13, 20

United States v. *Roviaro*, 379 F.2d 911 (7th Cir. 1967) .. 20

United States v. *Russell*, 411 U.S. 423 (1973) 9, 10, 11

United States v. *Silvestri*, 719 F.2d 577 (2d Cir. 1983) ... 18

United States v. *Smith*, 757 F.2d 1161 (11th Cir. 1985) .. 19

United States v. *Valencia*, 645 F.2d 1158 (2d Cir. 1980) . 18

United States v. *Walker*, 720 F.2d 1527 (11th Cir. 1983), *cert. denied*, 465 U.S. 108 (1984) 19

United States v. *Watson*, 489 F.2d 504 (3d Cir. 1973) 22

Constitution and Statutes

U.S. Const. amend. V 2

18 U.S.C. § 201(g) 1, 8

18 U.S.C. § 3231 8

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 8

Law Review Articles

Cronin, *The Law of Entrapment in Massachusetts and the First Circuit*, 14 Suffolk U.L. Rev. 1203 (1980). 18

Groot, *The Serpent Beguiled Me and I (Without Scienter) Did Eat—Denial of Crime and the Entrapment Defense*, 1973 U. Ill. L.F. 254 13

Nagle, *Inconsistent Defenses in Criminal Cases*, 92 Mil. L. Rev. 77 (1981) 19, 20, 23

Note, *Pleading the Entrapment Defense: The Propriety of Inconsistency*, 28 N.Y.L. Sch. L. Rev. 1025 (1983) 10, 14, 16, 18, 19, 20

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is *United States* v. *Matthews*, 803 F.2d 325 (7th Cir. 1986) (J.A. 132). That citation includes the denial of petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc*. 803 F.2d at 325. (J.A. 147).

The United States District Court for the Eastern District of Wisconsin did not issue a written decision on the entrapment defense. The transcripts of its oral decisions on the issue are included in the Joint Appendix. (J.A. 2, 131).

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Seventh Circuit affirming the judgment below was entered on October 9, 1986. The order denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* was entered October 29, 1986. The Petition for Writ of Certiorari was filed December 27, 1986 and was granted March 30, 1987. This court has jurisdiction pursuant to Title 28 of the United States Code, section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner was convicted of violating Title 18 of the United States Code, section 201(g), which provides as follows:

> Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for

> or because of any official act performed or to be performed by him;
>
> . . . .
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

The fifth amendment to the United States Constitution provides in relevant part as follows:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The Small Business Administration ("SBA") is an agency of the United States. (R.37:124). Its purpose is to assist small businesses with financing, business advice, and obtaining government contracts. (R.37:124).

Petitioner Frederick Mathews ("Mathews") was employed in the Milwaukee SBA office as a Business Development Specialist. (J.A. 10; R.37:124-25). His job was to facilitate the 8A Program, which is designed to encourage small businesses owned by socially and economically disadvantaged small business concerns. (R.37:124-25).

Midwest Knitting Mills, Inc. was, at all times material to this case, a qualified small business eligible for participation in the 8A Program. (J.A. 8; R.37:125). James DeShazer ("DeShazer") was its owner and operator. (J.A. 6). At some time prior to November or December of 1984, Midwest Knitting Mills arranged with the SBA to receive advance payments to enable it to perform on various contracts. (J.A. 12-13).

Prior to 1979, DeShazer knew Mathews on a social basis. (J.A. 9). DeShazer and Mathews had lunches and evening drinks together, played the lottery together, and shared discussions of personal and family matters. (J.A. 106, 117-18). Mathews was a quiet man, a loner who kept to himself and considered DeShazer a friend as well as a business acquaintance, particularly in light of the confidences they shared. (J.A. 117-18; R.38:434-35). DeShazer also considered Mathews a personal friend. (J.A. 101). At one point in 1983 Mathews asked for and received from DeShazer a loan in the amount of $1,500.00 to assist in paying his daughter's college expenses. (J.A. 16-17, 93). DeShazer told the FBI and a business associate named Ken Little that Mathews emphasized that it was a personal loan and that the request was entirely personal. (J.A. 101-02).

In November of 1984, Mathews was relieved of full responsibility for the Midwest Knitting Mills File. (J.A. 113, 119-20; R.38:450, 456). At the same time, in November or December of 1984, Midwest Knitting Mills began having problems getting its advance payments through the SBA to facilitate its purchase of raw materials to perform its government contracts. (J.A. 23-24).

During that time, DeShazer also started "getting a lot of heat" from the United States Navy's purchasing agent about fulfillment on certain contracts. (J.A. 95). It was during this November-December time period that DeShazer began to blame Mathews for his business woes. (J.A. 23-25). He told the Navy's agent that he suspected that Mathews was not processing the documents, and said that Mathews kept asking him for money. (J.A. 23-24, 95-96). In November of 1984, on his own initiative, DeShazer began to tape record his conversations with Mathews. (J.A. 96). None of these tapes were preserved

or submitted to the government, because, according to DeShazer, they were all erased or unintelligible. (J.A. 29, 96). DeShazer's reasoning for suspecting Mathews was as follows:

> Q. You put two and two together back, you say, in June of 1984; that you believed that the advance payments were somehow tied to Mr. Mathews' request for money that you talked about, right?
>
> A. That's correct.
>
> Q. And what you thought then that was that Mr. Mathews was not going to—was going to tell you he was not going to do anything until he gets the money, right?
>
> A. That's correct.
>
> Q. But what Mr. Mathews had told you was that he had done everything, right?
>
> A. He told me that, sure.
>
> Q. So you assumed that Mr. Mathews was lying to you and expected you to see through that lie and realize that he was holding you up for money.
>
> A. That is the way I took it.

(J.A. 54-55).

At trial DeShazer admitted that in fact Mathews had not requested any loans since July of 1984. (J.A. 20). In addition, DeShazer accused Mathews, in the summer of 1984, of failing to process his documents because of DeShazer's failure to grant Mathews' earlier personal loan request. (J.A. 90). DeShazer stated that Mathews vehemently denied this. (J.A. 90, 112). Through the Navy purchasing agent, the Department of Defense then referred the matter to the FBI for investigation in January, 1985. (J.A. 23-26).

In approximately January of 1985, after DeShazer had voiced his suspicions to the Navy agent, the FBI contacted DeShazer regarding his allegations that Mathews was soliciting loans from him, and asked DeShazer to assist in an investigation of Mathews. (J.A. 25). After an initial interview wherein DeShazer told the FBI that "Mathews continues to ask for money" and "has called him as many as five to six times in a single day with [requests for loans]," DeShazer agreed to tape-record conversations with Mathews if the FBI would supply him with equipment. (J.A. 25-26).

On or about February 22, 1985, Mathews was informed by his superior at the SBA that his employment would be terminated within the next month or so. (J.A. 119-21). Mathews told DeShazer and other clients about his impending termination. (J.A. 121-22).

On or about February 28, 1985, DeShazer and Mathews met socially at a restaurant. (J.A. 29, 121). During that meeting, DeShazer told Mathews that he had arranged a loan of approximately $12,000.00, that he had the money in cash in his garage, that he needed only $7,000.00 of it, that he did not want his wife to find out about the extra cash, and that he would loan $4,200.00 to Mathews. (J.A. 29-31, 99-100, 121-23). Mathews was interested in the loan because he was financially strapped due to his impending termination, his separation from his wife, and the resultant increased living expenses. (J.A. 121-23).

Over the next several weeks, DeShazer tape recorded a number of conversations between DeShazer and Mathews. (J.A. 68-69). DeShazer did not tape record all of the conversations. (J.A. 68-69). Mathews testified that after the late February meeting, he decided to accept the money as a personal loan if DeShazer was sincere about offering it. (J.A. 123-26).

DeShazer testified that all tape recorded telephone conversations he had with Mathews involved discussions of the loan payment. (J.A. 68-69). By way of impeachment, however, the parties stipulated at trial that in all of the tape recorded conversations during the two months between February 28, 1985 and April 23, 1985, the subject of the loan came up only once, on April 8. (J.A. 107).

On April 8, 1985, DeShazer called Mathews and asked Mathews to meet him after work. (J.A. 23, 35-36, 123). DeShazer gave Mathews a ride to the service station that was repairing Mathews' car. (J.A. 36-37, 123-24). On the way there, DeShazer again offered to loan the money to Mathews, and they arranged a meeting during which he would give the loan money to Mathews. (J.A. 38-39, 125). Mathews did not keep that appointment. (J.A. 125-26).

In the two and one-half weeks between April 8 and April 23, the loan did not come up again until, in a telephone conversation on April 23, 1985, the night before their final meeting, DeShazer asked Mathews if he was still interested in the loan and suggested that Mathews might not get any of it because DeShazer might spend it himself. (J.A. 68, 125). This conversation began with Mathews calling to tell DeShazer that a meeting at his bank, scheduled for the next day, had been cancelled. (J.A. 67). After telling DeShazer this, Mathews made the salutary comment, "well, I will see you in the morning then, . . . well, I will see you tomorrow anyway . . . ." (J.A. 67). At this point DeShazer brought up the loan again, stating, "you ain't said nothing to me in the last week on this other thing," and "Ain't going to be nothing there for you to get," and "The devil tempts me, you know what I mean?" (J.A. 67, 69). Mathews then agreed to meet DeShazer the next day for lunch. (J.A. 125).

The next morning, April 24, 1985, DeShazer went to the SBA and talked to Mathews. (J.A. 98-99). Mathews told DeShazer that he couldn't meet him for lunch, but that he would call later to arrange a meeting. (J.A. 99). At 11:00 a.m. on the 24th, DeShazer called Mathews to tell him that he was meeting an IRS employee to get some documents regarding a payment plan for delinquent taxes. (J.A. 99). DeShazer also told Mathews in this conversation that he was getting very nervous with that money in his garage and that he wanted to get rid of it to avoid a second divorce, which DeShazer said might occur should his wife learn about the money in the garage. (J.A. 99). Mathews promised to call DeShazer later. (J.A. 100). DeShazer then called Mathews to confirm a 1:30 p.m. meeting. (J.A. 100). Without confirming the meeting, Mathews told DeShazer he would call back. (J.A. 100). At 1:30 DeShazer called Mathews again, telling him that he had the IRS document and that if Mathews wanted it, he would be at the Greenery Restaurant. (J.A. 64-65, 100-01). Mathews then agreed to meet DeShazer at the restaurant. (J.A. 65).

During the meeting at the Greenery, Mathews first inquired about the IRS letter. (J.A. 65, 127). The conversation then turned to the processing of advance payments. This conversation was prompted by DeShazer's questioning. (J.A. 47-48, 127). Mathews explained, as he had previously, that everything was in order and had been processed. (J.A. 127). Because DeShazer seemed upset, Mathews "let him rant and rave on," although he was in a hurry and thinking of other matters. (J.A. 127). DeShazer then said he had the loan money there, and Mathews accepted it. (J.A. 48-49, 126). DeShazer suggested that they leave the restaurant separately, but Mathews said they could leave together. (J.A. 49, 65-66). Mathews was arrested as he left the hotel. (R. 37:398).

Mathews was charged with receipt of money as an employee of the SBA, in violation of Title 18 of the United States Code, section 201(g). (R.5). The United States District Court for the Eastern District of Wisconsin had original jurisdiction pursuant to Title 18 of the United States Code, section 3231.

Mathews filed a motion in limine seeking to use the entrapment defense. (R.21, 22, 23). The trial court orally denied that motion. (J.A. 2). At the close of trial, Mathews moved for a mistrial based upon the entrapment issue, but the trial court denied that motion as well. (J.A. 131).

On August 19, 1985, the jury found Mathews guilty of receipt of money by an employee of the SBA for or because of an official act, in violation of Title 18 of the United States Code, section 201(g). (R. 28). The trial court suspended imposition of sentence on October 16, 1985 and placed Mathews on probation for three years, with a special condition of house arrest for two years. (R. 30).

Following the entry of judgment on October 18, 1985, Mathews filed a timely notice of appeal. (R.31). The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to Title 28 of the United States Code, section 1291.

SUMMARY OF ARGUMENT

The Seventh Circuit Court of Appeals' requirement that a defendant who wishes to claim entrapment must first admit that he committed the offense violates that defendant's Fifth Amendment rights by compelling him to incriminate himself before he can assert that the government induced him to commit the offense. There is no inconsistency in allowing a defendant to require the government to prove that he committed the offense, while

claiming that he was entrapped into doing so. Whether the defendant was predisposed to commit the offense, and therefore was not entrapped, is a jury question. The entrapment defense should have been submitted to the jury because Mathews' denial of criminal intent was not inconsistent with his claim of entrapment.

ARGUMENT

THE FIFTH AMENDMENT PROHIBITS COMPELLING A CRIMINAL DEFENDANT TO ADMIT ANY OF THE ELEMENTS OF THE OFFENSE.

A. This Court's Decisions Clearly Allow A Defendant To Use The Entrapment Defense When He Admits The Acts But Denies The Criminal Intent, As Did Mathews In The Instant Case.

The entrapment defense is premised upon "the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense but was induced to commit them by the government." *United States* v. *Russell*, 411 U.S. 423, 435 (1973). Nothing in this Court's history of the defense, however, requires a defendant to *admit* that he committed all the elements of a prescribed offense before he may claim that he was induced to commit them by the government, as the Seventh Circuit Court of Appeals required Mathews to do in the instant case. On the contrary, *Sorrells* v. *United States*, 287 U.S. 435, 452 (1932), expressly permits a defendant to plead not guilty and assert the entrapment defense. *See Sherman* v. *United States*, 356 U.S. 373 (1958)

The defense does not have a constitutional basis, although the possibility exists that in a particular case the law enforcement conduct in question may violate "that 'fundamental fairness, shocking to the universal sense of

justice,' mandated by the Due Process Clause of the Fifth Amendment." *Id.* at 431-32 (quoting *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)). *See* Note, *Pleading the Entrapment Defense: The Properiety of Inconsistency*, 28 N.Y.L. Sch. L. Rev. 1025, 1033 n.53 (1983).

Though the defense has no constitutional basis, constitutional implications nevertheless arise when, as in the instant case, courts restrict the use of the entrapment defense to cases where the defendant admits all elements of the crime charged, including *mens rea*. *See United States* v. *Mathews*, 803 F.2d 325, 327 (7th Cir. 1986); *United States* v. *Prickett*, 790 F.2d 35, 36 (6th Cir. 1986); *United States* v. *Mora*, 768 F.2d 1197, 1198-99 (10th Cir. 1985) (*per curiam*), *cert. denied*, 106 S. Ct. 856 (1986); *United States* v. *Hill*, 655 F.2d 512, 514 (3d Cir. 1981) Requiring a defendant to admit guilt before he may claim the defense infringes upon the defendant's constitutional right to require the government to prove each and every element of its case beyond a reasonable doubt. *E.g.*, *United States* v. *Demma*, 523 F.2d 981, 986 (9th Cir. 1975) (*en banc*). In effect, he must incriminate himself before he can assert the defense.

Over the past fifty-five years, this Court has focused upon "the intent or predisposition of the defendant to commit the crime." *Russell*, 411 U.S. at 429. *See also Hampton* v. *United States*, 425 U.S. 484, 488-89 (1976); *Sherman* v. *United States*, 356 U.S. at 372; *Sorrells* v. *United States*, 287 U.S. at 442 (1932). As now-Chief Justice Rehnquist noted in *Russell*, "[i]t is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." *Russell*, 411 U.S. at 436. In determining whether a particular defendant was pre-

disposed to commit the offense charged, the crucial question is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Sorrells*, 287 U.S. at 451. *See also Sherman*, 356 U.S. at 372.

In the instant case, Mathews fully admitted that he accepted money from DeShazer, but denied having the intent to accept the money as a gratuity. He further asserted that he was entrapped into accepting the money. Thus, he admitted doing all of the acts constituting the offense, but denied having the *mens rea* necessary to convert otherwise innocent conduct into a criminal offense.

Most of the evidence of intent, that is, that Mathews accepted the money for or because of official acts, came from DeShazer's statements during the taped conversations where DeShazer's business was discussed in the same conversation as discussions of the loan. Mathews denied ever making the link in his own mind between the loan and his official acts on DeShazer's behalf. Thus the evidence was consistent with both a denial of the intent element and a claim that the government's agent, DeShazer, created the crime by his own inducements. On that basis, Mathews was entitled to the entrapment defense. Denying Mathews the use of the entrapment defense in those circumstances effectively precluded him from using an entire theory of defense which was wholly consistent with his admission of the *acts* involved while denying that he had the criminal intent.

This case is before the Court on writ of certiorari to the United States Court of Appeals for the Seventh Circuit. In its decision below, the Seventh Circuit reiterated and

clarified its longstanding rule that a defendant who pleads entrapment must admit that he committed all of the physical acts and had the necessary criminal intent, before he may assert that the government implanted the criminal design in his mind. *Mathews*, 803 F.2d at 327. (J.A. 134-35). *See, e.g., United States* v. *Rodgers*, 755 F.2d 533, 550 (7th Cir. 1985); *United States* v. *Johnston*, 426 F.2d 112, 114 (7th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971). The Seventh Circuit found Mathews' entrapment defense "inconsistent *per se* with the defense that the defendant never had the requisite criminal intent." *United States* v. *Mathews*, 803 F.2d at 327. (J.A. 135).

The Seventh Circuit's current position directly conflicts with the Supreme Court's view that there is no inconsistency in joining an entrapment plea with a not guilty plea. *Sorrells*, 287 U.S. at 452. Certainly if a defendant simply pleads not guilty, he is not admitting even as much as Mathews did. Under *Sorrells* and its progeny, as well as under the fifth amendment's protections, the Seventh Circuit's rule requires the defendant to relinquish a constitutional right as a condition precedent to use of the entrapment defense. This case therefore should be reversed and remanded for a new trial.

B. In Addition To Conflicting With This Court's Holdings, The Seventh Circuit's Insistence That Mathews Concede His Guilt Before He Can Claim Entrapment Violates Mathews' Constitutional Rights Under The Fifth Amendment.

The Seventh Circuit's rule compelling defendants to admit their guilt before they may claim entrapment is founded upon *Ortega* v. *United States*, 348 F.2d 874 (9th Cir. 1965), a Ninth Circuit case which relied upon *Eastman* v. *United States*, 212 F.2d 320 (9th Cir. 1954). The Ninth Circuit has since overruled *Eastman* and its pro-

geny. *United States* v. *Demma*, 523 F.2d at 982. As part of the Ninth Circuit's analysis and criticism of the *Eastman* rule, the court summarized the constitutional problems with the rule as follows:

> Continued adherence to *Eastman* would have generated serious constitutional problems by conditioning the assertion of a defense on the defendant's yielding his presumption of innocence, his right to remain silent, and his right to have the Government prove the elements of the crime beyond a reasonable doubt.
>
> As long as the *Eastman* "rule" lives, this circuit will be in conflict with *Sorrells*, *Sherman*, and *Russell;* our internal law will be in disarray; and the constitutional issues will hover. No sound reason exists to perpetuate the *Eastman* aberration.

Demma, 523 F.2d at 986 (footnote omitted) (citing Groot, *The Serpent Beguiled Me and I (Without Scienter) Did Eat—Denial Of Crime and the Entrapment Defense*, 1973 U. Ill. L.F. 254, 269-75). Although the *Demma* court declined to base its decision on constitutional grounds, it noted that its "restatement of entrapment law in the circuit avoids the constitutional problems that lurked in the *Eastman* line of cases . . . ." *Demma*, 523 F.2d at 986.

In the twelve years since the Ninth Circuit overruled *Eastman*, however, the Seventh Circuit has persisted in relying upon *Eastman* progeny as authority for its rule that a defendant must admit all elements of the crime, including *mens rea*, before he may claim the entrapment defense. *E.g.*, *United States* v. *Rodgers*, 755 F.2d at 550; *United States* v. *Liparota*, 735 F.2d 1044, 1048 (7th Cir. 1984); *United States* v. *Nicosia*, 638 F.2d 970, 972-73 (7th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). The Seventh

Circuit has undertaken no new analysis of its position, but simply continues to cite the "rule."

As a consequence of the Seventh Circuit's rule, Mathews must elect between denying his guilt while forgoing the entrapment defense, or pursuing the entrapment defense while conceding his guilt. To claim entrapment, he is forced to forfeit his fifth amendment right to remain silent and not incriminate himself, and his due process right to require the government to prove the crime charged beyond a reasonable doubt.

In *Simmons* v. *United States*, 390 U.S. 377 (1968), this Court dealt with the "intolerable" situation of a defendant having to surrender a constitutional right in order to assert another. *Id.* at 393-94. That case involved a defendant's need to incriminate himself by admitting ownership of incriminating evidence in order to obtain standing to challenge an illegal search. Although the entrapment defense does not yet rise to the level of a constitutional right, the *Simmons* holding nevertheless can be applied to the fifth amendment protections that Mathews had to sacrifice in order to claim the entrapment defense. Indeed, ". . . *Simmons* may be read as forbidding a forced trade-off of protection, even if one right is not constitutionally grounded, as long as that right remains fundamentally important." Note, *supra* p. 10, at 1072.

Mathews should not be precluded from asserting the entrapment defense solely because he exercises his fifth amendment and due process rights. In *Griffin* v. *United States*, 380 U.S. 609 (1965), this Court prohibited prosecutors from commenting upon defendants' failure to testify, thereby penalizing defendants who exercised their right to remain silent. The exercise of a constitutional right should not be costly to a defendant. *Id.* at 614. Thus,

penalizing a defendant who exercises his fifth amendment and due process rights by precluding him from exercising the important right to present all reasonable defenses is impermissible.

The oft-discussed concerns about inconsistent defenses and about predisposition are not at issue in this case. Even if they were, they would pale in light of the constitutional implications of denying a criminal defendant use of a defense unless he first incriminates himself by admitting that he committed a crime. "Whether the defendant had the criminal intent required for conviction is a jury issue. Whether he was predisposed to commit the charged crime . . . is also a jury issue." *United States* v. *Henry*, 749 F.2d 203, 213 (5th Cir. 1984) (*en banc*).

Mathews should be allowed to present both his lack of intent and his lack of predisposition to the jury and allow the jury to decide the issues. The consistency or inconsistency of particular defenses are a factor for the jury to consider in assessing the defendant's credibility. As the *Demma* court noted, "[i]nconsistent testimony by the defendant seriously impairs and potentially destroys his credibility." *Demma*, 523 F.2d at 985. Conversely, a defendant who elects not to testify may reduce his chances of success in persuading a jury that he was entrapped, but "that is a choice that he has a right to make free of any compulsion whatsoever." *United States* v. *Annese*, 631 F.2d 1041, 1047 (1st Cir. 1980).

Contrary to the suggestion in *Demma*, under the facts of this case the two defenses would not have been inconsistent, and the credibility of Mathews' overall defense would have been strengthened. Defense counsel could have acknowledged during closing argument that DeShazer's comments linking the loan and Mathews' official duties

were strong evidence of intent. Counsel could have further strongly argued that this intent was the creation of DeShazer and the government, entirely consistent with a classic entrapment defense. The jury could thus have consistently elected either ground for a verdict of acquittal.

C. The Conflict In The Circuits Results In Differing Applications Of The Entrapment Defense From Circuit To Circuit.

The circuits are sharply divided on whether a defendant can claim entrapment while denying scienter. As a consequence, a federal defendant in Milwaukee, such as Mathews, is treated differently from a similarly-charged defendant in Los Angeles or Dallas with regard to his ability to claim entrapment while exercising his constitutional rights. Two circuits allow a defendant to deny all elements of the crime, including physical acts and intent, and still claim entrapment. Four circuits allow the entrapment defense where, as in the instant case, the defendant admits committing the acts charged but denies possessing the requisite *mens rea*. Five circuits now require the defendant to admit all elements, including intent. One circuit requires the defendant to admit the acts involved in the offense, but has never clearly addressed the intent issue. *Ware* v. *United States*, 259 F.2d 442, 445 (8th Cir. 1958). *See* Note, *supra* p. 10, at 1063.

A defendant in the District of Columbia may deny intent but still claim entrapment. In *United States* v. *Kelly*, 748 F.2d 691 (D.C. Cir. 1984), an ABSCAM case, the District of Columbia Circuit Court of Appeals held that the entrapment instruction was properly given where the defendant testified that he took a bribe, but

claimed he did so to further an investigation and therefore lacked the necessary criminal intent. *Id.* at 696, 701 n.24. In its leading case on the entrapment issue, however, the District of Columbia Circuit did not require the defendant to admit any elements of the offense charged, and allowed the defendant to use "alternative but not inconsistent" defenses. *Hansford* v. *United States*, 303 F.2d 219, 221 (D.C. Cir. 1962) (*en banc*). The *Hansford* court held that "[i]t was consistent with defendant's denial of the transaction to urge that if the jury believed it did occur the government's evidence as to how it occurred indicated entrapment." *Id. See Kelly*, 748 F.2d at 701 n.24.

If a defendant in the Fifth Circuit admits the acts charged but presents evidence negating his criminal intent, he is entitled to an entrapment instruction. *United States* v. *Henry*, 749 F.2d 203, 205-06 (5th Cir. 1984) (*en banc*). As did Mathews, the defendant in that case testified and admitted the acts but denied possessing the requisite scienter. *Id.* at 206. The Fifth Circuit concluded that "a *non-testifying* defendant may—by examination of witnesses and argument—contest every element of the charged offense and still request and obtain an entrapment instruction." *Id.* at 210 (emphasis in original). When the defendant testifies, however, the same rule applies because it "is entirely consistent with the nature of the jury function and with the nature of the entrapment defense to require the jury to consider both the existence and the quality of the defendant's alleged intent." *Id.* at 211. The Fifth Circuit took the approach that the accused is not guilty if he was not predisposed to commit the crime, rather than the approach that he is guilty of the crime but can avoid punishment because the government entrapped him. *Id.* at 210. In so doing, the Fifth Circuit aligned itself with this Court's long line of cases cited earlier.

The fate of a defendant in the First Circuit is not quite as clear due to some earlier confusion arising from a footnote in *United States* v. *Caron*, 588 F.2d 851, 852 n.4 (1st Cir. 1978). That footnote commented that "the issue of entrapment does not arise until a defendant admits commission of the crime charged but asserts that the offense was instigated by the actions of the law-enforcement officers." *Id.* On the basis of that footnote, the First Circuit was characterized as requiring the defendant to admit all elements, including intent, before the entrapment defense would be available. Note, *supra* p. 10, at 1050 n.146; Cronin, *The Law of Entrapment in Massachusetts and the First Circuit*, 14 Suffolk U.L. Rev. 1203, 1234-35 (1980). In *United States* v. *Annese*, 631 F.2d 1041 (1st Cir. 1980), however, the court held that a testifying defendant must admit the acts, need not admit his guilt as to the offense, but cannot actually deny his guilt. *Id.* at 1046. In holding that a non-testifying defendant may claim the entrapment defense, the court held that the defendant must choose whether to testify "free of any compulsion whatsoever. To hold otherwise would raise a serious fifth amendment problem." *Id.* at 1047.

In a slightly different approach, the Second Circuit Court of Appeals allows a defendant to claim entrapment while contending that his acts did not violate the law, as long as he does not take the stand. *United States* v. *Silvestri*, 719 F.2d 577, 580 n.1 (2d Cir. 1983). He need not admit the allegedly criminal acts as long as he does not deny them. *United States* v. *Valencia*, 645 F.2d 1158 (2d Cir. 1980).

Generally, a defendant in the Eleventh Circuit may not use the entrapment defense if it conflicts with another defense theory, although certain exceptions exist. An entrapment defense is allowed in conjunction with a not

guilty plea as long as the defenses are not so inconsistent as to confuse the jury. *United States* v. *Walker*, 720 F.2d 1527, 1534 (11th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984). As long as such seemingly inconsistent defenses are not "impermissibly inconsistent"—that is, they do not disprove each other—they are allowed. *United States* v. *Smith*, 757 F.2d 1161, 1168-69 (11th Cir. 1985).

A defendant in the Ninth Circuit enjoys the broadest range of defense opportunities with regard to this issue. In *United States* v. *Demma*, 523 F.2d 981 (9th Cir. 1975) (*en banc*), the Ninth Circuit Court of Appeals developed what are still the strongest arguments in favor of the "permissive" approach to the entrapment debate. *See* Note, *supra* p. 10, at 1051-54, 1065; Nagle, *Inconsistent Defenses in Criminal Cases*, 92 Mil. L. Rev. 77, 106-09 (1981). *Demma* permits a defendant to deny committing any element of the crime, including intent, and yet claim entrapment. *Id.* at 983. Both defendants in *Demma* testified that they did the acts, but denied that they possessed the scienter necessary to convert their conduct into criminal activity. *Id.* at 982. Basing its rationale upon *Sorrells*, the *Demma* court held that "[t]he requirement that the defendant concede a state of mind is in direct conflict with the *Sorrells* conception of entrapment." *Demma*, 523 F.2d at 983. Thus, the Ninth Circuit permits totally inconsistent defenses on the premise that a defendant's assertion of entrapment while he simultaneously denies committing the acts constituting the offense simply raises a credibility question for the jury. *Id.* at 985.

At the opposite end of the entrapment spectrum are the Third, Fourth, Sixth, Seventh and Tenth Circuits, which require the defendant to admit every element of the offense, including *mens rea*, before he can claim that he was entrapped. Prior to *Demma*, the Ninth Circuit was

also included in that group. *United States* v. *Eastman*, 212 F.2d 370 (9th Cir. 1954).

Of that group, as indicated earlier, the Seventh Circuit Court of Appeals is the strongest advocate of the so-called "inconsistency rule" prohibiting use of the entrapment defense in conjunction with a denial of any element of the offense. *See, e.g.*, Note, *supra* p. 10, at 1047-48 and n.134; Nagle, *supra* p. 19, at 114. That circuit's position, however, is founded upon *Ortega*, a progeny of *Eastman*, which was expressly overruled in *Demma*. *Demma*, 523 F.2d at 982; *United States* v. *Roviaro*, 379 F.2d 911, 914 (7th Cir. 1967). *See United States* v. *Nicosia*, 638 F.2d 970, 977-78 (7th Cir. 1980) (Swygert, J., dissenting), *cert. denied*, 452 U.S. 961 (1981). Although the Seventh Circuit has been tempted to reconsider its rule, it has consistently adhered to the *Eastman*-based rule. *United States* v. *Rodgers*, 755 F.2d at 550; *Nicosia*, 638 F.2d at 972-73.

In recent cases, the Third, Sixth and Tenth Circuits also have generally followed the rule that requires defendants to admit all elements of the crime charged before they may claim entrapment. *United States* v. *Prickett*, 790 F.2d 35, 36 (6th Cir. 1986); *United States* v. *Mora*, 768 F.2d 1197, 1198-99 (10th Cir. 1985) (*per curiam*), *cert. denied*, 106 S. Ct. 856 (1986); *United States* v. *Hill*, 655 F.2d 512, 514 (3d Cir. 1981).

The most recent convert to the "inconsistency rule" group is the Fourth Circuit Court of Appeals. For nearly thirty years, until *United States* v. *Dorta*, 783 F.2d 1179 (4th Cir. 1986), the Fourth Circuit's position on the entrapment issue was the same as the Ninth Circuit's current *Demma* rule: the defendant was allowed to assert totally inconsistent defenses, including claiming entrapment, without conceding that he committed the

crime or any of its elements. *Crisp* v. *United States*, 262 F.2d 68, 70 (4th Cir. 1958). In *Dorta*, however, the Fourth Circuit rejected *Crisp's* reasoning and held that the defendant must concede that he committed the crime in question before he can claim that he was entrapped into doing so. *Dorta*, 783 F.2d at 1181-82. But the precise issue before this Court was not addressed. It is not clear whether a defendant in the Fourth Circuit can admit only the acts and still avail himself of the entrapment defense.

Perhaps the easiest explanation for the diverse holdings in the various circuits is that a number of circuits have mistakenly relied upon the concurring opinion in *Sorrells*. In his concurrence in *Sorrells*, Justice Roberts noted that a defendant who commits a crime, albeit due to government inducement, is within the letter of the law proscribing the criminal conduct and is therefore "amenable to its penalties." *Sorrells*, 287 U.S. at 456 (Roberts, J., concurring). According to Justice Roberts the entrapment defense does not excuse the criminal conduct or somehow render the statute in question inapplicable to that defendant. *Id.* at 455-56. Nor does it entitle the defendant to "a double defense under his plea of not guilty, namely, (a) that what he did does not fall within the definition of the statute, and (b) entrapment." *Id.* at 456.

The *Sorrells* majority, however, expressly considered and rejected the government's contention that the entrapment defense was not available to a defendant who pleads not guilty. *Id.* at 452. Thus, from *Sorrells* forward, this Court has allowed defendants to plead not guilty and still claim the entrapment defense. As the Ninth Circuit noted, "the requirement that the defendant concede a state of mind is in direct conflict with the *Sorrells* conception of entrapment." *Demma*, 523 F.2d at 983. On that basis alone, the district court's refusal to allow Mathews

to claim entrapment is contrary to the law of the land, and reversal is mandated.

In addition, all of the circuits continuing to require the defendant to admit the crime, including *mens rea*, have simply continued to rely upon *Eastman* and its progeny, despite the Ninth Circuit's *Demma* decision overruling *Eastman*. For example, the Third Circuit's most recent pronouncement simply states the "rule" without comment, citing an earlier circuit case. *Hill*, 655 F.2d at 514 (citing *United States* v. *Watson*, 489 F.2d 504, 507 (3d Cir. 1973)). That case relied upon the Ninth Circuit case of *United States* v. *Hendricks*, 456 F.2d 167, 169 (9th Cir. 1972), which is a descendant of *Eastman*.

Similarly, in *United States* v. *Prickett*, 790 F.2d at 36, the Sixth Circuit recently reiterated its reliance upon *United States* v. *Mitchell*, 514 F.2d 758, 761 (6th Cir.), *cert. denied*, 423 U.S. 847 (1975), for the same rule. The *Mitchell* court relied upon *United States* v. *Barrios*, 457 F.2d 680 (9th Cir. 1972), which traces its roots to *Ortega* and thence to *Eastman*.

The Tenth Circuit also cites "well-settled" law in the circuit that the defendant must admit the crime to use the entrapment defense. *United States* v. *Rivera*, 778 F.2d 591, 598 (10th Cir. 1985) (citing *Munroe* v. *United States*, 424 F.2d 243, 244 (10th Cir. 1970) (*en banc*). The *Munroe* holding to that effect is based upon *Ortega*.

The Fourth Circuit relies upon virtually all of the cases just discussed. *United States* v. *Dorta*, 783 F.2d at 1181. Of the circuits discussed above, however, the issue of inconsistency when a defendant admits the acts but not the intent has not been specifically addressed in the Third and Fourth Circuits.

Thus, the five circuits still refusing to allow a defendant to claim entrapment unless he admits all elements of the offense are simply perpetuating the theoretically and constitutionally infirm *Eastman* principles which were soundly rejected in *Demma*. Although some of the cases address concerns with predisposition determinations and analyses of whether a given set of defenses is impermissibly inconsistent, their original fundamental basis remains *Eastman*.

Six years ago, one commentator expressed great concern about the "serious split among the circuits . . . on a fundamental right of any defendant—the right to present evidence." Nagle, *supra* p. 19, at 125. He concluded:

> It is a fundamental flaw in the American system of justice if an individual arrested in San Francisco in the Ninth Circuit can assert entrapment while still putting the Government to its proof, while a defendant arrested in Chicago in the Seventh Circuit for the same offense or even as part of the same conspiracy can assert entrapment only at the expense of his constitutional rights. Such a dichotomy cries out for correction.

Id.

CONCLUSION

Frederick Mathews respectfully urges this Court to reverse his conviction and grant him a new trial with the ability to claim the entrapment defense without forfeiting his constitutional rights to remain silent, to refrain from incriminating himself, and to require the government to prove every element of the offense charged beyond a reasonable doubt. In so doing, this Court will eliminate a longstanding dichotomy in the circuits while reiterating and clarifying its well-established holdings on the entrapment defense.

Respectfully submitted,

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OCTOBER TERM, 1987

FREDERICK MATHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner was entitled to an entrapment instruction at his trial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Summary of argument	8
Argument:	
Petitioner was not entitled to a jury instruction on the defense of entrapment	11
A. The evidence at trial was insufficient to raise an entrapment defense	12
B A defendant cannot both deny commission of the crime and obtain an instruction on entrapment	26
Conclusion	34

TABLE OF AUTHORITIES

Cases:

Casey v. *United States*, 276 U.S. 413 (1928)	17, 19, 23
Griffin v. *United States*, 380 U.S. 609 (1965)	30
Grimm v. *United States*, 156 U.S. 604 (1895)	17
Hampton v. *United States*, 425 U.S. 484 (1976)	15, 18
Hansford v. *United States*, 303 F.2d 219 (D.C. Cir. 1962)	29
Harris v. *New York*, 401 U.S. 222 (1971)	32
Holloway v. *United States*, 432 F.2d 775 (10th Cir. 1970)	14
Johnson v. *United States*, 426 F.2d 651 (D.C. Cir. 1970)	31
Kadis v. *United States*, 373 F.2d 370 (1st Cir. 1967)	18, 22
Lopez v. *United States*, 373 U.S. 427 (1963)	18

Cases—Continued: Page

Martin v. *Ohio*, No. 85-6461 (Feb. 25, 1987) 29, 30
Masciale v. *United States*, 356 U.S. 386 (1958) 20
Nix v. *Whiteside*, No. 84-1321 (Feb. 26, 1986) 11, 12, 31, 32
Osborn v. *United States*, 385 U.S. 323 (1966) 25
Nutter v. *United States*, 289 F. 484 (4th Cir. 1923) 28
Patterson v. *New York*, 432 U.S. 197 (1977) 29-30
People v. *Mills*, 178 N.Y. 274, 70 N.E. 786 (1904) 13
Sherman v. *United States*, 356 U.S. 369 (1958) 8, 9, 12, 13, 14-15, 18, 19, 20, 26
Simmons v. *United States*, 390 U.S. 377 (1968) 30
Sorrells v. *United States*, 287 U.S. 435 (1932) 12, 13, 15, 16, 17, 19, 27, 28, 30
Strickland v. *Washington*, 466 U.S. 668 (1984) 33
Tzimopolous v. *United States*, 554 F.2d 1216 (1st Cir.), cert. denied, 434 F.2d 851 (1977) 22
United States v. *Andrews*, 765 F.2d 1491 (11th Cir. 1985), cert. denied, No. 85-5572 (Jan. 13, 1986) 18, 20
United States v. *Anglada*, 524 F.2d 296 (2d Cir. 1975) 23
United States v. *Annese*, 631 F.2d 1041 (1st Cir. 1980) 28, 34
United States v. *Armocida*, 515 F.2d 49 (3d Cir.), cert. denied, 423 U.S. 858 (1975) 23
United States v. *Bagnell*, 679 F.2d 826 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983) 18, 22
United States v. *Bailey*, 444 U.S. 394 (1980) 22, 32
United States v. *Becker*, 62 F.2d 1007 (2d Cir. 1933) 12, 21
United States v. *Brooks*, 567 F.2d 134 (D.C. Cir. 1977) 23
United States v. *Burkley*, 591 F.2d 903 (D.C. Cir. 1978), cert. denied, 440 U.S. 966 (1979) 9, 15, 16, 19, 20, 21
United States v. *Christopher*, 488 F.2d 849 (9th Cir. 1973) 21
United States v. *Demma*, 523 F.2d 981 (9th Cir. 1975) 29, 30, 34

Cases—Continued: Page

United States v. *DeVore*, 423 F.2d 1069 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971) 16, 18, 22
United States v. *Dion*, 762 F.2d 674 (8th Cir. 1985), rev'd, No. 85-246 (June 11, 1986) 15
United States v. *Dorta*, 783 F.2d 1179 (4th Cir. 1986), cert. denied, No. 85-1713 (June 23, 1986) 28, 32, 33
United States v. *Eberhardt*, 417 F.2d 1009 (4th Cir. 1969), cert. denied, 397 U.S. 909 (1970) 32
United States v. *Garrett*, 716 F.2d 257 (5th Cir. 1983), cert. denied, 466 U.S. 937 (1984) 33
United States v. *Goodacre*, 793 F.2d 1124 (9th Cir. 1986), cert. denied, No. 86-5704 (Dec. 1, 1986) 16, 23
United States v. *Hawkins*, No. 87-1072 (7th Cir. June 17, 1987) 23
United States v. *Henry*, 749 F.2d 203 (5th Cir. 1984) 16, 27, 29, 32, 34
United States v. *Hill*, 655 F.2d 512 (3d Cir. 1981) 28
United States v. *Humphrey*, 670 F.2d 153 (11th Cir.), cert. denied, 456 U.S. 1010 (1982) 23
United States v. *Hunt*, 749 F.2d 1078 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985) 15, 21, 23
United States v. *Jackson*, 700 F.2d 181 (5th Cir.), cert. denied, 464 U.S. 842 (1983) 18
United States v. *Jannotti*, 673 F.2d 578 (3d Cir.), cert. denied, 457 U.S. 1106 (1982) 21-22, 24
United States v. *Kelly*, 748 F.2d 691 (D.C. Cir. 1984) 9, 16, 25
United States v. *Kutrip*, 670 F.2d 870 (8th Cir. 1982) 28
United States v. *Lambinus*, 747 F.2d 592 (10th Cir. 1984), cert. denied, 471 U.S. 1067 (1985) 24
United States v. *Liparota*, 735 F.2d 1044 (7th Cir. 1984), rev'd, 471 U.S. 419 (1985) 28
United States v. *Luce*, 726 F.2d 47 (1st Cir. 1984) 18, 21, 23
United States v. *Mayo*, 705 F.2d 62 (2d Cir. 1983) 21, 28

Cases—Continued: Page

United States v. *McLernan*, 746 F.2d 1098 (6th Cir. 1984) 18
United States v. *Mora*, 768 F.2d 1197 (10th Cir. 1985), cert. denied, No. 85-5437 (Jan. 21, 1986) 28
United States v. *Nations*, 764 F.2d 1073 (5th Cir. 1985) 16, 18, 23
United States v. *Ortiz*, 804 F.2d 1161 (10th Cir. 1986) 15, 16, 18, 21, 23
United States v. *Perl*, 584 F.2d 1316 (4th Cir. 1978), cert. denied, 439 U.S. 1130 (1979) 14
United States v. *Rhodes*, 713 F.2d 463 (9th Cir.), cert. denied, 464 U.S. 1012 (1983) 14, 21, 23
United States v. *Riley*, 363 F.2d 955 (2d Cir. 1966) 10, 20, 21, 26
United States v. *Rodgers*, 755 F.2d 533 (7th Cir. 1985), cert. denied, 473 U.S. 907 (1985) 18
United States v. *Russell*, 411 U.S. 423 (1973) 8, 12, 13, 15, 18, 21, 27, 29, 30, 32
United States v. *Sarmiento*, 786 F.2d 665 (5th Cir. 1986) 18
United States v. *Sherman*, 200 F.2d 880 (2d Cir. 1952) 20, 21
United States v. *Smith*, 757 F.2d 1161 (11th Cir. 1985) 28
United States v. *Whitley*, 734 F.2d 1129 (6th Cir. 1984) 28
United States v. *Williams*, 705 F.2d 603 (2d Cir.), cert. denied, 464 U.S. 1007 (1983) 21
United States v. *Woosley*, 761 F.2d 445 (8th Cir. 1985) 23

Statute and rule:

18 U.S.C. 201(g) 2, 5, 26
Fed. R. Civ. P. 8(e)(2) 31
Fed. R. Crim. P.:
Rule 11 30
Rule 12 30

Miscellaneous: Page

Barlow, *Entrapment and the Common Law: Is There a Place for the American Doctrine of Entrapment*, 41 Mod. L. Rev. 266 (1987) 12

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Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 Sup. Ct. Rev. 111 ..... 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-6109

FREDERICK MATHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 101-108) is reported at 803 F.2d 325.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1986. A petition for rehearing was denied on October 29, 1986. The petition for a writ of certiorari was filed on December 27, 1986, and was granted on March 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. 201(g) provides:

> Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; * * *
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of accepting a gratuity as a public official, in violation of 18 U.S.C. 201(g). He was sentenced to a three-year term of probation. The court of appeals affirmed (Pet. App. 101-108).

1. The government's evidence at trial established that petitioner was responsible for administering the so-called "8A program" of the Small Business Administration (SBA) in Milwaukee, Wisconsin. That program was designed to aid small businesses owned by minorities and economically disadvantaged individuals. Under the program, the SBA would obtain government contracts and subcontract them to participating firms; it also would provide assistance to the firms in performing the contracts, and when necessary it would help participating firms obtain payment in advance of performance. Pet. App. 102; Tr. 124-125, 127-128, 130-131, 136-137. Until the time of his arrest on April 24, 1985, petitioner had primary responsibility for obtaining 8A program con-

tracts and advance payments for SBA client firms in Milwaukee, and for assisting those firms with the associated paperwork. Tr. 124-125, 127, 131, 135-137.

One of the long-term participants in the 8A program was Midwest Knitting Mills (Midwest). As early as 1979, petitioner had assisted Midwest's president, James DeShazer, in obtaining financing for his company (J.A. 116). By 1983, petitioner was Midwest's principal contact at the SBA (*id.* at 10-11). Yet beginning in 1982, petitioner repeatedly asked DeShazer for money. When DeShazer was seeking bank financing in that year, petitioner demanded a $1,200 payment to "get you a bank" (J.A. 16). DeShazer did not make that payment, but in February 1983 petitioner called DeShazer to request a $1,500 loan, which petitioner said he needed to help pay his daughter's college expenses. DeShazer made the loan, which was not repaid (*id.* at 16-18). Later that year, petitioner requested an additional $1,200 loan to help meet his mortgage payments. DeShazer again lent the money to petitioner, and again was not repaid (*id.* at 18-19).[1]

In February 1984, petitioner and DeShazer met to discuss Midwest's failure to receive advance payments from the SBA that were necessary for the performance of its contracts. At that meeting, petitioner asked DeShazer for a $3,000 personal loan (J.A. 12-15). Although DeShazer refused to make the payment at that time, petitioner repeated his request for the money on several occasions between February

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[1] DeShazer also lent petitioner an additional $200 in 1983 (J.A. 20). The existence of all of these loans was confirmed by a 1984 letter from DeShazer to petitioner requesting repayment (GX 13). After DeShazer sent this letter, petitioner made one repayment in the amount of $200 (J.A. 50-51).

and July of 1984 (*id.* at 20, 85, 94). During that same period, DeShazer noted that petitioner had failed to process his requests for payment on Midwest's 8A contracts (*id.* at 27). In October 1984, DeShazer complained to representatives of the Defense Department, one of his customers, that he believed he was being denied advance payments because he would not make payoffs to petitioner (*id.* at 23-24). The Defense Department in turn reported this allegation to the Federal Bureau of Investigation (FBI), which in early 1985 asked DeShazer to assist an investigation by recording his conversations with petitioner. DeShazer agreed. *Id.* at 25-27.

DeShazer and petitioner met in February 1985 (J.A. 29). At that meeting, DeShazer offered petitioner the $4,200 he had previously requested if petitioner would agree to process Midwest's application for advance payments.[2] DeShazer told petitioner that he "want[ed] to give you that forty-two hundred dollars, if you can assure me that this is going to solve my problems." Petitioner responded: "sure, I am sure that I can do that," adding that the payment would "solve the problem." J.A. 30-31. In the following weeks, petitioner and DeShazer spoke many times about Midwest's financial problems (*id.* at 32). The two met again on April 8 in DeShazer's car. After a discussion of DeShazer's prospects for obtaining financing for his company, petitioner asked, "what can you do for me?" (see *id.* at 125; Tr. 508). Petitioner then referred to DeShazer's statement in February of that year that he had recently come into a large sum of money. DeShazer responded that he

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[2] The $4,200 represented the $1,200 petitioner had requested in 1982 and the $3,000 he had requested in February 1984.

would pay petitioner in two installments of $2,100 each.[3] And DeShazer again explained to petitioner "the critical situation that I was in, * * * I kept saying, are you going to, can you tell me once I do this, this nightmare that I have is over? And he told me that it would be." *Id.* at 38-39.

Petitioner and DeShazer spoke by telephone on April 23, 1985, and agreed that DeShazer would make a $2,100 payment the next day (J.A. 41-42).[4] After an exchange of calls the following morning, they agreed to meet in a hotel restaurant (*id.* at 99-101). At the hotel, petitioner asked for the money; after obtaining petitioner's assurances that the payment would end Midwest's financial problems, DeShazer passed the money under the table (*id.* at 47-49). Petitioner was arrested as he left the hotel.

2. At the outset of trial, the district court ruled that petitioner would not be permitted to argue entrapment as a defense. The court explained that a defendant is entitled to argue entrapment only if he "concede[s] that what he did was wrong" (J.A. 3). Because petitioner denied accepting the payment from DeShazer for the performance of his official duties—and thus denied having the requisite mental state for a violation of 18 U.S.C. 201(g)—the court ruled that petitioner could not rely on the defense of entrap-

[3] The tape recording of this conversation—in which petitioner asked, "so, what can you do for me, man?"—was played for the jury and was admitted into evidence as Government Exhibit 1.

[4] In this conversation, DeShazer asked if petitioner was still interested in the payment; petitioner responded, "I'm just waiting for your lead." The tape recording of this conversation, which was played for the jury, was admitted into evidence as Government Exhibit 2.

ment (*id.* at 3-4). The court did, however, permit petitioner "to proceed with the theory, at least, that the acts of the [petitioner] were procured by the overt acts of this princip[al] witness of the Government, Mr. DeShazer, and to develop[] that as part of [his] first line of defense" at trial (*id.* at 131).

Petitioner subsequently testified at trial. While he disputed some of the particulars of the government's case,[5] he acknowledged that he had borrowed money from DeShazer in 1983 (J.A. 119). He also acknowledged that he had accepted DeShazer's offer of a loan in February 1985 (*id.* at 122); that whenever the subject was broached subsequently he had indicated that he was "[still] interested in" the loan (*id.* at 123, 125); and that he had brought up the topic of DeShazer's offer at their April 8 meeting, stating that "he would still be willing to accept" the money (*id.* at 125; see *id.* at 123; Tr. 508-509). Petitioner also acknowledged that his discussions with DeShazer about the payment generally followed talk about Midwest's financial problems. J.A. 124-125, 127; Tr. 508. And petitioner conceded that he took $2,100 from DeShazer in an under-the-table payment on April 24, 1985, while telling DeShazer not to mention the payment to anyone (J.A. 126-127, 129). Petitioner contended, however, that he had viewed the loan as a personal one that was not connected to the performance of his job (*id.* at 127-130). He attributed the two-month delay between the original offer of the

[5] Petitioner asserted that he had asked for and borrowed money from DeShazer only once prior to April 1985 and that he had partially repaid that loan (J.A. 119). He also testified that as of January 1984 he did not have full responsibility for the 8A program (*id.* at 120), and that he had in fact fully processed Midwest's request for advance payment (*id.* at 124).

loan and the delivery of the money to his doubts that DeShazer actually had the money or was "really sincere about the loan" (*id.* at 126; see *id.* at 122, 123, 125, 126).

At the close of the evidence, the district court declined to give an entrapment instruction. Petitioner argued that the court's ruling on that issue was a ground for a mistrial. The government opposed this motion for two reasons, arguing (1) that a defendant may not both deny commission of the offense and argue entrapment, and (2) that petitioner had not, in any event, adduced sufficient evidence of entrapment to warrant an instruction on the issue (Tr. 622). The district court found it unnecessary to address the government's second argument. Instead, the court ruled that petitioner was not entitled to an entrapment instruction because he "elected * * * to deny the intent and the other elements in the [offense]" (J.A. 131). The court went on to note, however, that the evidence of entrapment was "shaky at best," adding that "it would normally require more evidence than what is presently in the record on which to predicate an entrapment instruction" (*ibid.*). The jury returned a verdict of guilty.

3. The court of appeals affirmed, holding that petitioner was not entitled to raise an entrapment defense (Pet. App. 101-108).[6] The court explained that

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[6] At points, petitioner appeared to base his challenge in the court of appeals on the district court's initial ruling that he would not be permitted to argue entrapment. See Pet. C.A. Br. 14. Petitioner did not point to any evidence bearing on the entrapment issue that he believed to have been erroneously excluded as a consequence of this ruling, however, and it appears that his real challenge was to the district court's refusal to instruct the jury on entrapment at the close of the case. See *id.* at 20, 23; Pet. C.A. Reply Br. 3-4.

Seventh Circuit precedent "requir[es] a defendant to admit all elements of the crime before being allowed to plead entrapment" (*id.* at 103). In the court of appeals' view, "[w]hen a defendant pleads entrapment, he is asserting that, although he had criminal intent, it was 'the Government's deception [that implanted] the criminal design in the mind of the defendant'" (*ibid.* (quoting *United States* v. *Russell*, 411 U.S. 423, 436 (1973)). The court found "this to be inconsistent *per se* with the defense that the defendant never had the requisite criminal intent"; the court thus saw "no reason to allow [petitioner] or any defendant to plead these defenses simultaneously" (Pet. App. 103).[7]

SUMMARY OF ARGUMENT

A. The affirmative defense of entrapment may be invoked when "the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted." *Sherman* v. *United States*, 356 U.S. 369, 376 (1958). As this definition suggests, the entrapment doctrine is designed to protect "innocent" persons—those who lack a predisposition to commit crime—from overbearing police tactics that are likely to induce criminal behavior on the part of otherwise law-abiding citizens. The entrapment defense thus has two components: the crime must have been induced by the government, and the defendant must not have been predisposed.

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[7] The court of appeals also rejected petitioner's argument that the government had exercised its peremptory challenges in a discriminatory way in striking prospective jurors (Pet. App. 105-108). This Court denied certiorari on petitioner's challenge to that aspect of the decision below.

The courts have uniformly held that the government may be said to have induced an offense only if the police behavior was such that it would likely have overborne "a law-abiding citizen's will to obey the law." *United States* v. *Kelly*, 748 F.2d 691, 698 (D.C. Cir. 1984). Simple solicitation or initiation of the crime by the government plainly does not fall within this category, since " 'solicitation by itself is not the kind of conduct that would persuade an otherwise innocent person to commit a crime' " *United States* v. *Burkley*, 591 F.2d 903, 912 (D.C. Cir. 1978) (citation omitted), cert. denied, 440 U.S 966 (1979). Instead, as this Court's holdings suggest, inducement can be made out only if the government used coercion or some other sort overbearing conduct to instigate the offense. Conversely, a defendant who is predisposed—whose "criminal conduct was due to his own readiness and not to the persuasion of government agents" (*Sherman*, 356 U.S. at 376-377)—cannot claim entrapment. And obviously, the surest indication of this sort of predisposition is the defendant's unhesitating acceptance of the government's criminal offer.

Because entrapment is an affirmative defense, it need not be submitted to the jury unless the defendant makes a threshold showing of inducement and lack of predisposition. Petitioner plainly failed to make such a showing in this case. The "inducement" here was a simple criminal proposition: the government's agent offered petitioner cash in return for official action. This is hardly the sort of conduct that would have overborne the will of a normally law-abiding person. At the same time, absolutely nothing in petitioner's reaction to the proposal suggests that he was not predisposed. To the contrary, petitioner's

eager acceptance of the offer made it clear beyond dispute, in Judge Friendly's words, that "the accused was 'ready and willing without persuasion' " to commit the offense. *United States* v. *Riley*, 363 F.2d 955, 957 (2d Cir. 1966). Because the evidence at trial thus was insufficient to raise either element of the defense, the courts below were correct in holding that petitioner was not entitled to a jury instruction on entrapment.

B. Petitioner was not entitled to an entrapment instruction for a second, independent reason: his express denial of the crime was inconsistent with his simultaneous claim that he was entrapped into committing it. The court below, like a majority of the courts of appeals, will not permit a defendant both to testify that he did not commit the crime, and at the same time to argue that the government entrapped him. This "inconsistency rule" is a sound one.

Entrapment is a nonconstitutional affirmative defense that relieves the defendant of liability for what otherwise would be a crime. Because the law of entrapment is not governed by any constitutional principle, and because Congress has not enacted legislation affecting the defense in any way, the administration of the entrapment defense has remained principally the responsibility of the courts. The courts, in turn, have applied the defense in a way that is consistent with its underlying purposes and that furthers accuracy in the truth-seeking process. Applying their authority to shape the entrapment defense according to these principles, a great majority of the courts of appeals have concluded that withholding the defense from defendants who testify that they did not commit the crime accords most fully

with the "nature of a criminal trial as a search for truth." *Nix* v. *Whiteside*, No. 84-1321 (Feb. 26, 1986), slip op. 8.

When the defendant denies an element of the offense, he effectively testifies that he was not entrapped; if he nevertheless is permitted to argue entrapment, he will ask the jury to acquit him on a view of the facts that he himself has testified is not true. But a defendant, who has no right to present false testimony, may fairly be held to the story that he tells under oath. And if the defendant is expected to tell the truth when he testifies, there is no justification for permitting him to seek a windfall acquittal on grounds that are inconsistent with his stated view of the facts. In this case, because petitioner testified that he did not commit the crime, he was not entitled to an entrapment instruction.

ARGUMENT

PETITIONER WAS NOT ENTITLED TO A JURY INSTRUCTION ON THE DEFENSE OF ENTRAPMENT

The government's evidence at trial revealed that an informant, DeShazer, made a simple criminal proposal to which petitioner readily acquiesced. Testifying on his own behalf, petitioner acknowledged that he unhesitatingly accepted DeShazer's offer of money; he maintained, however, that he took the payment as a personal loan, rather than as recompense for official services. On this record, two independent reasons supported the decisions of the courts below to deny petitioner an entrapment instruction. An informant's simple offer of a criminal proposition is not the sort of government action that has ever been understood to amount to entrapment. Because petitioner could point to no more than that in this case,

he failed to make the threshold showing necessary to justify an instruction on the affirmative defense. At the same time, petitioner's attempt both to deny the crime and to argue that the government entrapped him into committing it—in effect, stating that "I didn't do it, and anyway the government made me do it"—is inconsistent with this Court's admonition that a criminal trial is ultimately "a search for truth." *Nix* v. *Whiteside*, No. 84-1321 (Feb. 26, 1986), slip op. 8.

A. The Evidence At Trial Was Insufficient To Raise an Entrapment Defense

1. The affirmative defense of entrapment may be invoked "when the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted." *Sherman* v. *United States*, 356 U.S. 369, 376 (1958). See *Sorrells* v. *United States*, 287 U.S. 435, 446-448 (1932). The doctrine, as Judge Learned Hand explained more than 50 years ago, "derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist." *United States* v. *Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933). But because the doctrine was created as a "spontaneous" response to particular prosecutions—and, perhaps, because the entrapment defense is not grounded in the Constitution,[8] in the common law,[9] or in any explicit state-

[8] See *United States* v. *Russell*, 411 U.S. 423, 433 (1973).

[9] Entrapment is not recognized as a defense in England (see Barlow, *Entrapment and the Common Law: Is There a Place for the American Doctrine of Entrapment*, 41 Mod. L. Rev. 266 (1978); Defeo, *Entrapment as a Defense to Criminal*

ment by Congress[10]—the Court has never expressly articulated either its purposes or its boundaries. See Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 Sup Ct. Rev. 111, 127.

It nevertheless is clear from the Court's treatment of entrapment claims that two considerations underlie the entrapment doctrine. First, the Court has concluded that defendants who are induced to commit crimes by overbearing government conduct—defendants repeatedly described by the Court as "unwary innocents" (*Sherman*, 356 U.S. at 372)[11] who lack a preexisting "disposition to commit the alleged offense" (*Sorrells*, 287 U.S. at 442)—are in some sense less culpable than other persons who engage in criminal conduct. Second, the Court has viewed as undesirable those police tactics that are likely to induce criminal behavior on the part of otherwise law-abiding persons. Such tactics are offensive because they can lead to criminal activity by (and the imposi-

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Responsibility: Its History, Theory and Application, 1 U.S.F. L. Rev. 243, 247 (1967)), and was rejected by American courts in the nineteenth and early twentieth centuries (see, *e.g.*, *People* v. *Mills*, 178 N.Y. 274, 70 N.E. 786 (1904)).

[10] A majority of the Court has found the entrapment defense implicit in criminal statutes, reasoning that it could not have been "the intention of the Congress in enacting [a given] statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Sorrells*, 287 U.S. at 446-448. See *Sherman*, 356 U.S. at 372.

[11] See also *United States* v. *Russell*, 411 U.S. at 434-435; *Sherman*, 356 U.S. at 376; *Sorrells*, 287 U.S. at 442, 446-448.

tion of criminal sanctions against) persons who, if left to their own devices, might not have violated the law. See Park, *The Entrapment Controversy*, 60 Minn. L. Rev. 163, 244 (1976).

As the Court has recognized, neither of these considerations, standing alone, is sufficient to defeat a prosecution, and neither is fully served by the entrapment doctrine in its current form.[12] When both considerations are present in a single case, however—when the defendant is an "unwary innocent" and the police tactics that induce the crime are overbearing—the Court has concluded that the defense may be invoked. In a case where coercive government tactics are directed against persons lacking the predisposition to commit a crime, the Court has reasoned, the resulting "criminal conduct [is] 'the product of the *creative* activity' of law enforcement officials," and therefore should not be punished. *Sherman*, 356 U.S.

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[12] On the one hand, persons who are induced to commit criminal acts by third parties are not ordinarily regarded as nonculpable: a person led into criminal conduct by a private actor rather than by a government agent may not claim entrapment, or for that matter argue that his conduct is "less criminal" because it was induced by another. *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring in the result). See *United States* v. *Rhodes*, 713 F.2d 463, 467 (9th Cir.), cert. denied, 464 U.S. 1012 (1983); *United States* v. *Perl*, 584 F.2d 1316, 1320-1321 (4th Cir. 1978), cert. denied, 439 U.S. 1130 (1979); *Holloway* v. *United States*, 432 F.2d 775, 776 (10th Cir. 1970). On the other hand, it is impossible to determine in any given case whether a defendant would have remained law-abiding had it not been for the government inducement, since "the very fact that an entrapped defendant accepts an inducement conclusively proves that he poses a risk of committing the offense whenever a similar inducement might be offered in the future." Seidman, *supra*, 1981 Sup. Ct. Rev. at 141.

at 372 (quoting *Sorrells*, 287 U.S. at 451) (emphasis added in *Sherman*). See *United States* v. *Russell*, 411 U.S. at 435-436. See generally Park, *supra*, 60 Minn. L. Rev. at 240-242. The Court's application of the entrapment doctrine, in Judge McGowan's words, has thus been directed at "protecting the otherwise unpredisposed defendant" from police tactics calculated to lead law-abiding persons into crime. *United States* v. *Burkley*, 591 F.2d 903, 912 (D.C. Cir. 1978), cert. denied, 440 U.S 966 (1979)[13]

2. The policies served by the entrapment doctrine dictate the two elements that must be present to make out an entrapment claim: government inducement and a lack of predisposition to engage in the criminal conduct. These elements are, of course, closely related. The nature of a defendant's response to an inducement—his readiness to commit the crime at the government's invitation—obviously bears on whether he is predisposed, rather than an undisposed "innocent." The nature of the inducement, in turn, may help dictate the defendant's response. See *United States* v. *Hunt*, 749 F.2d 1078, 1085 n.9 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985);

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[13] The Court has made it clear that "the principal element in the defense of entrapment" is "the defendants's predisposition to commit the crime" (*Russell*, 411 U.S. at 433). Indeed, a finding that the defendant was predisposed is fatal to an entrapment defense. See *id.* at 436; *Hampton* v. *United States*, 425 U.S. 484, 488-489 (1976) (plurality opinion); *id.* at 492 n.2 (Powell, J., concurring in the judgment). See generally *United States* v. *Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986); *United States* v. *Dion*, 762 F.2d 674, 684 (8th Cir. 1985), rev'd on other grounds, No. 85-246 (June 11, 1986); *United States* v. *Hunt*, 749 F.2d 1078, 1085 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985).

United States v. *Nations*, 764 F.2d 1073, 1079 (5th Cir. 1985). Both elements therefore are ultimately concerned with the single question whether the government "implant[ed] in the mind of an innocent person the disposition to commit the alleged offense" (*Sorrells*, 287 U.S. at 442). Yet because inducement focuses on the government's conduct, while predisposition is concerned with the defendant's state of mind, it is convenient to consider the two elements separately.

a. The courts have uniformly held that the government may be said to have induced an offense only if the "behavior [of law enforcement agents] was such that a law-abiding citizen's will to obey the law could have been overborne" (*United States* v. *Kelly*, 748 F.2d 691, 698 (D.C. Cir. 1984))—if, in other words, there was "government conduct that would create a risk of causing an otherwise unpredisposed person to commit the crime charged" (*Burkley*, 591 F.2d at 914).[14] Thus, again in Judge McGowan's words, "mere government solicitation or initiation [of the crime] is, without more, insufficient to raise the entrapment defense"; that conclusion "rests on the not unreasonable behavioral assumption that 'solicitation by itself is not the kind of conduct that would persuade an otherwise innocent person to commit a crime'" (*id.* at 911-912 (quoting *United States* v. *DeVore*, 423 F.2d 1069, 1071 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971)).

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[14] See, *e.g.*, *United States* v. *Hawkins*, No. 87-1072 (7th Cir. June 17, 1987), slip op. 9; *United States* v. *Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986); *United States* v. *Nations*, 764 F.2d at 1079; *United States* v. *Henry*, 749 F.2d 203, 207 n.5 (5th Cir. 1984) (en banc).

The validity of this conclusion is confirmed by this Court's holdings. In its earliest consideration of the issue, the Court rejected assertions of the entrapment defense when the defendant "was in no way induced to commit the crime beyond the simple request of [a government informant]." *Casey* v. *United States*, 276 U.S. 413, 419 (1928). See *Grimm* v. *United States*, 156 U.S. 604, 609-610 (1895).[15] And in its first lengthy treatment of entrapment, the Court made it clear that "the defense of entrapment is not simply that the particular act was committed at the instance of government officials" (*Sorrells*, 287 U.S. at 451). To the contrary, the Court pronounced it "well settled that the fact that officers or employees of the Government merely afforded opportunities or facilities for the commission of the offense does not defeat the prosecution" (*id.* at 441). "Artifice and strategem," the Court explained, are "frequently es-

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[15] In *Casey*, the defendant provided morphine at the request of a government informant (see 276 U.S. at 422 (Brandeis, J., dissenting)). Although the defendant failed to make an entrapment argument, the Court specifically suggested that such a defense would be unavailable, explaining that the defendant "was in no way induced to commit the crime beyond the simple request of [the informant] to which he seems to have acceded without hesitation and as a matter of course" (*id.* at 419). The government's initiation of the transaction, the Court added, was no different in substance from an agent's "ordering a drink [from] a suspect bootlegger" (*ibid.*). In *Grimm*, a government official solicited information about obscene materials through the mails; the defendant was prosecuted when he responded to this solicitation. The Court rejected the defendant's challenge to the prosecution—even though the illegal material was "deposited in the mails at the instance of the government"—because the government's action had been taken "to ascertain whether the defendant was engaged in an unlawful business" (156 U.S. at 609-610).

sential to the enforcement of the law" (*ibid.*). See *Russell*, 411 U.S. at 435-436; *Sherman*, 356 U.S. at 372; cf. *Lopez* v. *United States*, 373 U.S. 427, 436 (1963).[16] In the succeeding years, the courts of appeals have uniformly agreed that an entrapment defense cannot be raised when a government agent does no more than initiate the criminal transaction by offering the defendant money, soliciting contraband, or proposing the crime, since such conduct "merely afford[s] [the defendant] with the opportunity to commit an offense he was not otherwise unready to commit." *United States* v. *Luce*, 726 F.2d 47, 49 (1st Cir. 1984).[17]

Instead, the courts have held that inducement can be established only by a showing of at least " 'persuasion or mild coercion' and 'pleas based on need, sympathy, or friendship' " (*United States* v. *Nations*, 764 F.2d at 1080 (citations omitted)).[18] Again, this

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[16] The Court has recognized that the use of undercover techniques is essential in combatting narcotics offenses and consensual crimes. See *Russell*, 411 U.S. at 432; *Hampton* v. *United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring in the result); Park, *supra*, 60 Minn. L. Rev. at 164.

[17] See, *e.g.*, *DeVore*, 423 F.2d at 1071; *United States* v. *Sarmiento*, 786 F.2d 665, 667 (5th Cir. 1986); *United States* v. *Rodgers*, 755 F.2d 533, 550 (7th Cir. 1985), cert. denied, 473 U.S. 907 (1985); *United States* v. *Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986); *United States* v. *Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985), cert. denied, No. 85-5572 (Jan. 13, 1986).

[18] See, *e.g.*, *Kadis* v. *United States*, 373 F.2d 370, 374 (1st Cir. 1967); *DeVore*, 423 F.2d at 1071; *United States* v. *Jackson*, 700 F.2d 181, 191 (5th Cir.), cert. denied, 464 U.S. 842 (1983); *United States* v. *McLernan*, 746 F.2d 1098, 1113-1114 (6th Cir. 1984); *United States* v. *Bagnell*, 679 F.2d 826, 835 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983). See

Court's holdings are illustrative. In finding an entrapment defense available in *Sorrells*, a prosecution for a violation of the National Prohibition Act (see 287 U.S. at 438), the Court noted that an undercover agent had made repeated requests for liquor despite the defendant's obvious reluctance to supply it (*id.* at 439-440); the Court found it crucial that the defendant's ultimate decision to provide the liquor was "instigated by the prohibition agent * * * by repeated and persistent solicitation in which [the agent] succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War" (*id.* at 441). Similarly, the Court held that entrapment was established in *Sherman*, where a reluctant defendant provided narcotics to an informant only after repeated requests "predicated on [the informant's] presumed suffering" (356 U.S. at 371; see *id.* at 373). In contrast, the Court found no inducement where the defendant responded to an informant's "simple request" for narcotics. *Casey*, 276 U.S. at 419.[19]

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generally Park, *supra*, 60 Minn. L. Rev. at 180-183. Citing a circuit jury instruction, Judge McGowan suggested that inducement includes " 'persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship. A solicitation, request or approach by law enforcement officials to engage in criminal activity, standing alone, is not an inducement.' " *Burkley*, 591 F.2d at 913 & n.18. It is clear, however, that " 'promises of reward' " do not include simple offers of gain through participation in an illegal activity, since law enforcement officers " 'may properly offer to give to the defendant money which is involved in the commission of the crime itself' " (*ibid.*). See *id.* at 914.

[19] The only court to take a different approach is the Second Circuit, which has defined inducement to include "soliciting,

b. Whatever the inducement offered by the government, a defendant is not entrapped when his "criminal conduct was due to his own readiness and not to the persuasion of government agents" (*Sherman*, 356 U.S. at 376-377)—when, that is, the defendant was predisposed to engage in the criminal activity. The Court has treated such persons, who "needed no persuasion" to commit the crime (*Masciale* v. *United States*, 356 U.S. 386, 388 n.3 (1958)), as fully culpable. In part, of course, this predisposition inquiry is the flip side of the inducement question, since a defendant may suggest the absence of predisposition "by demonstrating that he had not favorably received the government plan, and the government had to 'push it' on him, or that * * * on at least one occasion he had directly refused to participate" (*United States* v. *Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985), cert. denied, No. 85-5572 (Jan. 13, 1986)). But the existence of predisposition does not hinge solely on the objective nature of the government's action: it turns on whether the defendant was "*ready and willing* to commit the crime"

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proposing, initiating, broaching or suggesting the commission of the offense charged." *United States* v. *Sherman*, 200 F.2d 880, 883 (2d Cir. 1952). At the same time, however, the Second Circuit has held that "even when inducement [is] shown, submission [of the entrapment question] to the jury is not required if uncontradicted proof has established that the accused was 'ready and willing without persuasion' and to have been 'awaiting any propitious opportunity to commit the offense.'" *United States* v. *Riley*, 363 F.2d 955, 958-959 (2d Cir. 1966). As Judge McGowan has noted, "[t]he practical effect of *Riley* is to require something more than government solicitation or initiation, but to do so in terms of predisposition rather than in terms of inducement" (*Burkley*, 591 F.2d at 913).

when it was proposed (*Burkley*, 591 F.2d at 916 (emphasis in original)). Cf. *Russell*, 411 U.S. at 433.

Obviously, the surest indication of this sort of predisposition is the defendant's unhesitating acceptance of the government's criminal offer—or, as Judge Learned Hand described it, the defendant's " 'willingness to [commit the offense], as evinced by ready complaisance' " (*United States* v. *Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (quoting *Becker*, 62 F.2d at 1008)). See *United States* v. *Riley*, 363 F.2d 955, 959 (2d Cir. 1966) (Friendly, J.) (predisposition present when "the accused was 'ready and willing without persuasion' and [was] 'awaiting any propitious opportunity to commit the offense' ").[20] In such a case, the defendant's ready acceptance of a criminal offer makes it clear that he was "of a frame of mind such that once his attention [was] called to the criminal opportunity, his decision to commit the crime [was] the product of his own preference and not the product of government persuasion" (*United States* v. *Williams*, 705 F.2d 603, 618 (2d Cir.), cert. denied, 464 U.S. 1007 (1983)). Thus, to take just one example, "the very acceptance of a bribe by a public official may be evidence of a predisposition to do so whenever the opportunity is presented" (*United States* v. *Jannotti*, 673 F.2d 578,

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[20] Accord *United States* v. *Luce*, 726 F.2d 47, 49 (1st Cir. 1984); *United States* v. *Mayo*, 705 F.2d 62, 69 (2d Cir. 1983); *United States* v. *Hunt*, 749 F.2d 1078, 1085 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); *United States* v. *Christopher*, 488 F.2d 849, 850 (9th Cir. 1973); *United States* v. *Rhodes*, 713 F.2d 463, 467 (9th Cir.), cert. denied, 464 U.S. 1012 (1983); *United States* v. *Ortiz*, 804 F.2d 1161, 1166 (10th Cir. 1986); *Burkley*, 591 F.2d at 916.

604 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982)). See *Tzimopolous* v. *United States*, 554 F.2d 1216, 1217 (1st Cir.), cert. denied, 434 F.2d 851 (1977).

3. Affirmative defenses such as entrapment need not be submitted to the jury unless "the testimony given or proffered meets a minimum standard as to each element of the offense." *United States* v. *Bailey*, 444 U.S. 394, 415 (1980); see *id.* at 416. Indeed, while the Court has never had occasion to apply this rule directly in an entrapment case, it has found it obvious that an inadequate showing by the defendant "might well * * * justif[y] a refusal to instruct the jury at all on entrapment" (*Lopez*, 373 U.S. at 436 (footnote omitted)). The courts of appeals therefore have held without exception that the defendant is not entitled to an entrapment instruction unless he "come[s] forward with evidence 'that the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it.'" *United States* v. *Bagnell*, 679 F.2d 826, 834 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983) (citation omitted).[21]

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[21] Most courts have held that the defendant has the burden of producing evidence on inducement, which, when satisfied, obligates the government to prove predisposition. See 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 5.2(4) (1986). Other courts, however, have collapsed the inqury, holding that inducement and predisposition are ultimately concerned with the single question whether the defendant was prepared to commit the crime in the absence of the government conduct. See, *e.g.*, *Kadis* v. *United States*, 373 F.2d 370, 373-374 (1st Cir. 1967); *United States* v. *Devore*, 423 F.2d 1069, 1071 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971). But this distinction in approach is, to a large degree, semantic: because the concepts of inducement and predisposition are so

And given the nature of the entrapment defense, it is not surprising that the courts have required a showing of "inducement by a government agent *and* a lack of predisposition by the defendant" before submitting an entrapment claim to the jury. *United States* v. *Rhodes*, 713 F.2d 463, 467 (9th Cir.) (emphasis in original), cert. denied, 466 U.S. 1012 (1983).[22]

4. In this case, petitioner plainly failed to make the threshold showing of either inducement or lack of predisposition that would have justified submitting the entrapment issue to the jury. Even viewing the evidence in the light most favorable to petitioner, it is evident that the "inducement" in this case was a simple criminal proposition: the government's agent, DeShazer, offered petitioner cash in return for official action. As the Court put it in *Casey*, petitioner "was in no way induced to commit the crime beyond the

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closely related, every court requires some evidence that an innocent and reluctant defendant was corrupted by the government before sending the entrapment issue to the jury.

[22] See, *e.g.*, *United States* v. *Luce*, 726 F.2d 47, 49 (1st Cir. 1984); *United States* v. *Anglada*, 524 F.2d 296, 298 (2d Cir. 1975); *United States* v. *Armocida*, 515 F.2d 49, 55 (3d Cir.), cert. denied, 423 U.S. 858 (1975); *United States* v. *Hunt*, 749 F.2d 1078, 1085 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); *United States* v. *Nations*, 764 F.2d 1073, 1079 (5th Cir. 1985); *United States* v. *Hawkins*, No. 87-1072 (7th Cir. June 17, 1987), slip op. 8-10; *United States* v. *Woosley*, 761 F.2d 445, 448 (8th Cir. 1985); *United States* v. *Goodacre*, 793 F.2d 1124, 1125-1126 (9th Cir. 1986), cert. denied, No. 86-5704 (Dec. 1, 1986); *United States* v. *Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986); *United States* v. *Humphrey*, 670 F.2d 153, 155 (11th Cir.), cert. denied, 456 U.S. 1010 (1982); *United States* v. *Brooks*, 567 F.2d 134, 138 (D.C. Cir. 1977); *id.* at 142 (Robinson, J., dissenting).

simple request of [the agent] to which he seems to have acceded without hesitation and as a matter of course" (276 U.S. at 419).[23] While the transaction was not consummated immediately because of petitioner's doubts that DeShazer actually had the money, in none of their subsequent conversations did DeShazer do more than restate his willingness to make the payment, a proposal to which petitioner readily agreed; indeed, petitioner acknowledged that at the April 8, 1985, meeting, he was the one who brought up the subject of the payment.

Petitioner argued in the court of appeals that "DeShazer did more than merely provide the opportunity; he persuaded, begged, and encouraged [petitioner] to take [the money]" (Pet. C.A. Reply Br. 3; see Pet. C.A. Br. 2). This contention is entirely unsupported by the record. While DeShazer made several offers, petitioner's own testimony indicates that he unhesitatingly accepted each one (see J.A. 122, 123, 125, 127). DeShazer at no point "persuaded" or "begged" petitioner to do anything. Indeed, since petitioner contended at trial that he intended only to borrow the money because he was "financially strapped"

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[23] It is doubtful that a simple offer of money in any amount can qualify as an inducement of a sort sufficient to constitute entrapment; law-abiding persons are expected to resist temptation when unaccompanied by coercion or other kinds of pressure. But it is clear, in any event, that the offer of $4,200 to a defendant making an annual salary of $38,000 (see Tr. 491) did not impose undue pressure, particularly where, as here, the amount was simply the sum that the defendant himself had previously solicited. Cf. *United States* v. *Lambinus*, 747 F.2d 592, 598 (10th Cir. 1984), cert. denied, 471 U.S. 1067 (1985); *United States* v. *Jannotti*, 673 F.2d 578, 599 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982).

(J.A. 123), it would have been nonsensical for him to have suggested that petitioner begged him to take a loan. And the only "encouragement" offered by DeShazer was the suggestion that he might spend the money himself if he did not give it to petitioner (see *id.* at 69). That is hardly an "inducement" within the meaning of this Court's decisions: placing a time limit on a criminal proposition is not the sort of government action that would induce a normally law-abiding citizen to engage in criminal conduct.[24]

In this case, then, the government did not make use of coercion, threats, pleas based on need or sympathy, or, for that matter, even simple persuasion. The transaction here consisted of an offer and an acceptance. In these circumstances, the government's action plainly was not "such that a law-abiding citizen's will to obey the law could have been overborne" (*Kelly*, 748 F.2d at 698). "At the most," DeShazer's proposal "afforded the petitioner 'opportunities or facilities' for the commission of a criminal offense, and that is a far cry from entrapment." *Osborn* v. *United States*, 385 U.S. 323, 331-332 (1966).

At the same time, petitioner failed to create any doubt whatsoever about his predisposition to commit the crime. Even leaving aside petitioner's previous requests for loans and his conceded acceptance of

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[24] Petitioner also contended in the court of appeals (Pet. C.A. Reply Br. 3) that DeShazer urged him "to take the excess money so that DeShazer would not get into trouble with his wife." In fact, however, DeShazer indicated (according to petitioner's trial testimony (see J.A. 122)) only that he kept the money from which the payment would be made in his garage because "he didn't want his wife to know about the total amount." Not surprisingly, DeShazer did not make the incredible statement that he would get into trouble with his wife unless petitioner took a payoff.

money from DeShazer in 1983, petitioner at no point disputed DeShazer's testimony that he accepted the first and every subsequent offer of a payoff without hesitation. To the contrary, petitioner acknowledged that he expressed interest whenever DeShazer raised the possibility of a payment, and he conceded that he himself made an unsolicited inquiry about the payment on April 8, 1985. Petitioner contended only that he did not have an improper motive in taking the money—a contention that was necessarily rejected by the jury. " '[U]ncontradicted evidence' " thus "established that the accused was 'ready and willing without persuasion' " to commit the offense (*Riley*, 363 F.2d at 958). A person who jumps at a criminal opportunity in that way can hardly be characterized as an "unwary innocent" (*Sherman*, 356 U.S. at 372).

For these reasons, the evidence at trial was not sufficient to raise either element of the defense of entrapment. The district court was therefore correct in refusing petitioner's request to instruct the jury on that defense.

B. A Defendant Cannot Both Deny Commission Of The Crime And Obtain An Instruction On Entrapment

1. At trial, petitioner denied commiting the crime; he took the stand and testified that he accepted money from DeShazer as a personal loan, rather than "for or because of any official act" (18 U.S.C. 201(g)). Despite petitioner's hints to the contrary (Pet. Br. 15-16), this defense necessarily was inconsistent with his simultaneous claim that he was entrapped.

As we have noted, entrapment "is a relatively limited defense" that is grounded "in the notion that

Congress could not have intended criminal punishment for a defendant who has committed *all the elements* of a proscribed offense, but was induced to commit them by the Government" (*Russell*, 411 U.S. at 435 (emphasis added)). By definition, the entrapment defense comes into play "only when the Government's deception actually implants the criminal design in the mind of the defendant" (*id.* at 436). See *Sorrells*, 287 U.S. at 442.[25] The definition of entrapment therefore presupposes that all the elements of the offense are present and that the defendant acted with a "criminal design." As a logical matter, then, the jury can find that a defendant was entrapped only if it finds that a crime was in fact committed. This means that by seeking an entrapment instruction while denying commission of the crime, petitioner was "claim[ing] the right to swear that he had no criminal intent and in the same breath to argue that he had one that did not originate with him." *United States* v. *Henry*, 749 F.2d 203, 214 (5th Cir. 1984) (en banc) (Gee, J., dissenting). Needless to say, both of these assertions cannot be true.

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[25] The Court in *Sorrells* reversed the holding of the court of appeals that "entrapment can be maintained only where, as a result of inducement, the accused is placed in the attitude of having committed a crime which he did not intend to commit, or where, by reason of the consent implied in the inducement, no crime has in fact been committed" (287 U.S. at 442 (citing 57 F.2d at 974)). One commentator has therefore observed that "[a] defendant who has not committed a criminal act with the requisite criminal intent cannot have been entrapped under federal law." Note, *Entrapment and the Denial of the Crime: A Defense of the Inconsistency Rule*, 1986 Duke L.J. 866, 889 (footnote omitted); see *id.* at 889 n.206.

2. a. For more than 60 years—even prior to the recognition of the entrapment defense by this Court in *Sorrells* [26]—it has been the rule in most circuits that a defendant cannot take inconsistent positions by simultaneously denying commission of the crime and arguing entrapment to the jury. That is now the approach taken by a substantial majority of the courts of appeals. At present, it appears that three circuits bar the assertion of an entrapment defense unless the defendant affirmatively admits commission of the crime.[27] Another five circuits have held that the defendant may not both deny commission of the crime and argue entrapment, although those courts foreclose the defendant from seeking an entrapment instruction only if he offers evidence contesting the elements of the offense.[28] Only two courts of appeals permit the defendant to testify (or introduce other evidence) contesting the existence of an element of the offense while simultaneously arguing entrapment

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[26] See, *e.g.*, *Nutter* v. *United States*, 289 F. 484, 485 (4th Cir. 1923).

[27] These are the Third, Sixth, and Seventh Circuits. See *United States* v. *Hill*, 655 F.2d 512, 514 (3d Cir. 1981); *United States* v. *Whitley*, 734 F.2d 1129, 1139 (6th Cir. 1984); *United States* v. *Liparota*, 735 F.2d 1044, 1048 (7th Cir. 1984), rev'd on other grounds, 471 U.S. 419 (1985).

[28] These are the First, Second, Fourth, Tenth, and Eleventh Circuits. See *United States* v. *Annese*, 631 F.2d 1041, 1046 (1st Cir. 1980); *United States* v. *Mayo*, 705 F.2d 62, 72-73 (2d Cir. 1983); *United States* v. *Dorta*, 783 F.2d 1179 (4th Cir. 1986), cert. denied, No. 85-1713 (June 23, 1986); *United States* v. *Mora*, 768 F.2d 1197, 1198-1199 (10th Cir. 1985), cert. denied, No. 85-5437 (Jan. 21, 1986); *United States* v. *Smith*, 757 F.2d 1161, 1169 (11th Cir. 1985). In addition, the Eighth Circuit has endorsed this approach in dictum. *United States* v. *Kutrip*, 670 F.2d 870, 876 (8th Cir. 1982).

to the jury.[29] One other circuit permits a defendant to deny the existence of the mental element of the offense, although not the criminal acts, while arguing entrapment.[30]

In our view, the majority rule—which prevents the defendant from simultaneously denying the crime while arguing that (if the crime was committed) he was entrapped into committing it—is the sounder one. At the outset, petitioner is plainly incorrect in asserting (Pet. Br. 10, 14-15) that there is any constitutional infirmity in such a rule. The government, of course, bears the burden of proving every element of the offense beyond a reasonable doubt. But the entrapment defense is not constitutionally grounded (see *Russell*, 411 U.S. at 433), and the absence of entrapment is not an element of any offense. Instead, entrapment is a court-created affirmative defense that relieves the defendant of liability for what otherwise would be a crime. And since entrapment comes into play only when all the elements of the crime have been established, its existence does not "serve to negative any facts of the crime which the [government] is to prove in order to convict." *Patterson* v. *New York*, 432 U.S. 197, 207 (1977). See *Martin* v. *Ohio*, No. 85-6461 (Feb. 25, 1987), slip op. 6-7.

In this setting, Congress would be free to make the entrapment defense available on whatever conditions, and to whatever category of defendants, it believed appropriate (see generally *Martin*, slip op. 4-7; *Pat-*

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[29] These are the Ninth and District of Columbia Circuits. See *United States* v. *Demma*, 523 F.2d 981, 982-985 (9th Cir. 1975) (en banc); *Hansford* v. *United States*, 303 F.2d 219, 221 (D.C. Cir. 1962).

[30] *United States* v. *Henry*, 749 F.2d 203, 207-214 (5th Cir. 1984) (en banc).

terson, 432 U.S. at 206-208)[31]—just as it could redraw the substance of the entrapment doctrine or, for that matter, eliminate the entrapment defense altogether. See generally *Russell*, 411 U.S. at 433.[32]

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[31] Petitioners' reliance (Pet. Br. 14) on *Simmons* v. *United States*, 390 U.S. 377 (1968), and *Griffin* v. *United States*, 380 U.S. 609 (1965), which respectively involved the forced waiver of a constitutional right and prosecutorial action that burdened the exercise of a constitutional right, is thus entirely misplaced. Because the entrapment defense is not "of a constitutional dimension" (*Russell*, 411 U.S. at 433), no constitutional guarantees are implicated if the defense is made available only to defendants who do not contest their guilt.

[32] The Ninth Circuit's decision that a defendant may introduce evidence contesting the existence of the crime while simultaneously arguing entrapment, *United States* v. *Demma*, 523 F.2d 981 (9th Cir. 1975) (en banc), predated and cannot be reconciled with this Court's holdings in *Martin* v. *Ohio*, *supra*, and *Patterson* v. *New York*, *supra*. The Ninth Circuit (like petitioner, see Pet. Br. 12, 21-22) reasoned that the inconsistency rule somehow conflicts with the holding in *Sorrells* that entrapment may be raised by a plea of not guilty (see 287 U.S. at 452); the *Demma* court relied on *Sorrells* for the proposition that "non-entrapment is an essential element of every federal crime which is put in issue whenever evidence is introduced suggesting that an unpredisposed defendant was induced by the Government to commit the acts charged" (523 F.2d at 983). In fact, however, affirmative defenses generally may be raised by a not guilty plea (see generally Fed. R. Crim. P. 11, 12). And as the cases cited in text demonstrate, that procedural fact does not make the absence of any given affirmative defense an element of the crime that must be proved by the government. Congress thus retains the right to make affirmative defenses available on the terms that it sees fit. The Ninth Circuit also relied on what it believed to be the general proposition that inconsistent defenses are permitted in criminal cases (523 F.2d at 985 & n.6). Perhaps because the issue arises infrequently

In the absence of any explicit congressional statement, it is for the courts to formulate rules governing the availability of entrapment.[33] The courts have done so in a manner that is responsive both to the policies underlying the entrapment defense and to society's interest in furthering the accuracy of the truth-finding process at trial.

b. As its lengthy pedigree and wide acceptance suggest, the rule preventing defendants from simultaneously asserting entrapment and denying commission of the crime is not at odds with the policies underlying the entrapment defense, and it most fully accords with what this Court has described as "the very nature of a trial as a search for truth." *Nix* v. *Whiteside*, No. 84-1321 (Feb. 26, 1986), slip op 8. In the absence of an independent constitutional imperative permitting him to do so, a defendant is not free to present evidence or arguments to the jury that fail to advance the trial's function of establishing factual guilt or innocence. The defendant may not, for example, introduce irrelevant evidence; sim-

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outside of the entrapment setting, however, the general propriety of inconsistent defense arguments is far from settled. See Note, *Entrapment and the Denial of Crime: A Defense of the Inconsistency Rule*, 1986 Duke L.J. 866, 878-879 & n.127. In any event, authority involving inconsistent defense arguments concerning the existence of elements of the offense (see, *e.g.*, *Johnson* v. *United States*, 426 F.2d 651, 653 n.3, 656 (D.C. Cir. 1970) (en banc) (rape defendant both denies act and argues consent))—as to which the government bears the burden of proof—has no bearing on the determination by Congress or the courts as to whether particular inconsistent *affirmative* defenses will be permitted.

[33] Fed. R. Civ. P. 8(e)(2) permits parties in civil actions to plead alternative theories; there is no parallel provision in the criminal rules.

ilarly, as we explain above, a defendant may not argue (or present evidence relating to) an affirmative defense that is factually insupportable (see *Bailey*, 444 U.S. at 416-417) or not legally cognizable (see *United States* v. *Eberhardt*, 417 F.2d 1009, 1012 (4th Cir. 1969), cert. denied, 397 U.S. 909 (1970)) —even if doing so might increase his chances of acquittal.

Permitting the defendant to argue entrapment after taking the stand and denying commission of the crime detracts in precisely the same way from "the integrity and the truth-finding function of our criminal trials." *United States* v. *Dorta*, 783 F.2d 1179, 1181-1182 (4th Cir. 1986), cert. denied, No. 85-1713 (June 23, 1986). When he denies an element of the offense, the defendant in effect testifies that he was not entrapped; in this case, for example, the government could hardly have "implant[ed] the criminal design" (*Russell*, 411 U.S. at 436) in petitioner's mind if, as petitioner testified, a criminal design never existed. If petitioner nevertheless obtained an entrapment instruction, he effectively would be asking the jury to acquit him on a view of the facts that he himself had testified is not true. See Note, *Entrapment and the Denial of the Crime: A Defense of the Inconsistency Rule*, 1986 Duke L.J. 866, 883-884.

Such an approach "is redolent of the sporting theory of justice" (*Henry*, 749 F.2d at 215 (Gee, J., dissenting)). "[T]here is no right whatever—constitutional or otherwise—for a defendant to use false evidence" (*Nix*, slip op. 15); once "[h]aving voluntarily taken the stand, [a defendant is] under an obligation to speak truthfully" (*Harris* v. *New York*, 401 U.S. 222, 225 (1971). See *Nix*, slip op. 9-10

(Blackmun, J., concurring in the judgment). A defendant therefore may fairly be held to the story that he tells under oath. And if the defendant is expected to tell the truth when he testifies, there is no justification for permitting him to seek a windfall acquittal on grounds that are inconsistent with his stated view of the facts. Cf. *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984).[34] "'A criminal prosecution * * * is not a game. It incorporates a moral content and an ultimate concern with guilt or innocence that are inconsistent with permitting the accused to say, "I didn't do it, but if I did, the government tricked me into it'" (*Dorta*, 783 F.2d at 1182 (citation omitted)). Accordingly, at least where the defendant offers evidence contesting commission of the crime, he should not be entitled to an entrapment instruction at trial.[35]

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[34] Presumably, a defendant who denies the crime while arguing entrapment hopes to benefit from either a "lawless" (*Strickland*, 466 U.S. at 695) or a confused jury. Indeed, the courts have noted that a denial of the crime combined with a claim of entrapment inevitably "will tend to 'confuse' the jury due to the 'inherent inconsistency' in saying at the same time that 'I didn't do it,' and 'the government tricked or seduced me into doing it.'" *United States* v. *Garrett*, 716 F.2d 257, 270 (5th Cir. 1983) (citations omitted), cert. denied, 466 U.S. 937 (1984). See Note, *supra*, 1986 Duke L.J. at 888.

[35] Several courts have held that a defendant need not concede commission of the crime to obtain an entrapment instruction, so long as the defense does not introduce evidence that is inconsistent with the government's position. See note 28, *supra*. Because petitioner in fact denied commission of the crime in this case, there is no need for the Court to determine the validity of this position. Nonetheless, we believe that there is much force to the rule adopted by the Third, Sixth and Seventh Circuits (see note 27, *supra*), which prohibits a defendant from arguing entrapment if he has not

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1987

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conceded commission of the crime, even if he did not introduce any evidence at trial. Even when the defendant does not deny his guilt from the stand or otherwise offer evidence contesting the government's proof on the elements of the offense, the defendant's argument to the jury is based on inconsistent contentions: it cannot simultaneously be true that the elements of the offense were not present and that the defendant was entrapped. And the entrapment defense is still being invoked by someone who, according to his argument to the jury, did not commit the offense at all and therefore could not have been entrapped by a government agent into commission of the crime. On the other hand, we recognize that, as a general matter, a defendant may put the government to its proof and take advantage of any defenses raised by the evidence. And we recognize that, in cases where the defendant has not offered evidence denying commission of the offense, some courts have felt that it unreasonably taxes the defendant's right to put the government to its proof on the issue of guilt for a court to require the defendant to stipulate to the commission of the offense in order to enjoy the benefits of the entrapment defense. See, *e.g.*, *United States* v. *Henry*, 749 F.2d at 211; *United States* v. *Annese*, 631 F.2d at 1046-1047; *United States* v. *Demma*, 523 F.2d at 984.

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No. 86-6109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FREDERICK MATHEWS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF REPLY ARGUMENT	1
REPLY ARGUMENT	1
I. DETERMINATION OF WHETHER A DEFENDANT WAS ENTRAPPED, LIKE THE DETERMINATION OF WHETHER THE DEFENDANT IS GUILTY OR INNOCENT, IS A QUESTION FOR THE JURY	1
II. THE EVIDENCE AT TRIAL DEMONSTRATED SUFFICIENT GOVERNMENT INDUCEMENT TO WARRANT AN ENTRAPMENT INSTRUCTION	6
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Casey v. *United States*, 276 U.S. 413 (1928)	7
Hampton v. *United States*, 425 U.S. 484 (1976)	8-9
Nix v. *Whiteside*, No. 84-1321 (Feb. 26, 1986)	3
Sherman v. *United States*, 356 U.S. 369 (1958)	2, 4, 5, 8
Sorrells v. *United States*, 287 U.S. 435 (1932)	2, 4, 5
United States v. *Demma*, 513 F.2d 981 (9th Cir. 1975)	4, 7
United States v. *Greenfield*, 554 F.2d 179 (5th Cir 1977).	3
United States v. *Jackson*, 700 F.2d 181 (5th Cir. 1983)	7
United States v. *Johnston*, 426 F.2d 112 87th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971)	6
United States v. *Kelly*, 748 F.2d 691 (D.C. Cir. 1984)	6
United States v. *Nations*, 764 F.2d 1073 (5th Cir. 1985)	6, 7, 8, 9
United States v. *Rey*, 706 F.2d 145 (5th Cir. 1983)	5
United States v. *Rhodes*, 713 F.2d 463 (9th Cir.), *cert. denied*, 466 U.S. 1012 (1983)	9
United States v. *Rogers*, 755 F.2d 533 (7th Cir. 1985)	6
United States v. *Russell*, 411 U.S. 423 (1973)	2, 4, 7
United States v. *Timberlake*, 559 F.2d 1375 (5th Cir. 1977)	5

LAW REVIEW ARTICLE

Note, *Pleading the Entrapment Defense: The Propriety of Inconsistency*, 28 N.Y. L. Sch. L. Rev. 1025 (1983) 3

SUMMARY OF REPLY ARGUMENT

I. In its search for truth, the jury should have available to it all evidence bearing upon the guilt or innocence of the accused. It is not inconsistent for a defendant to assert his innocence and yet claim entrapment. He could argue that he had not formed the subjective criminal intent necessary to find him guilty of the offense, and argue alternatively that if the jury found sufficient objective indicia of his criminal intent, the offense was the product of the government's creative activity.

II. The question of whether the record contains sufficient evidence to entitle Mr. Mathews to an entrapment instruction is not squarely before this Court. Nevertheless, the record clearly establishes that DeShazer induced Mathews to commit the offense by playing upon Mathews' dire financial circumstances and DeShazer's own dilemma of explaining a large sum of money to his wife. There is no evidence that Mathews was predisposed to commit the offense. Although Mathews had previously borrowed money from DeShazer, nothing in the record demonstrates that either party believed those exchanges were anything but personal loans. Thus, the government failed to prove beyond a reasonable doubt that Mathews was predisposed to commit the offense.

REPLY ARGUMENT

I. DETERMINATION OF WHETHER A DEFENDANT WAS ENTRAPPED, LIKE THE DETERMINATION OF WHETHER THE DEFENDANT IS GUILTY OR INNOCENT, IS A QUESTION FOR THE JURY.

Contrary to all of this Court's precedent, the government argues that the defendant who claims he was entrapped but denies having the intent to commit the offense is somehow gaining a windfall if the jury adopts the entrapment defense. That view assumes that the defendant is guilty but is allowed to go free because of the government's overreaching. It is on that basis that some circuits require the defendant to first admit his guilt before he can claim entrapment.

This court has long held, however, that the entrapment defense is not in the nature of a confession and avoidance. The *Sorrells* Court expressly held that "This . . . is a misconception. The defense is available, not in the view that the accused though guilty may go free, but that the government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct." *Sorrells* v. *United States*, 287 U.S. 435, 452 (1932). Very simply, *there is no crime* if the defendant's conduct is found to be the product of entrapment.

In that light, there is no impermissible inconsistency in submitting to a jury both the claim that the defendant lacked the intent to commit the offense and the claim that the defendant was entrapped. *Sorrells*, 287 U.S. at 452. The defendant may logically assert that although he committed certain acts comprising the elements of the offense, he had not formed the intent necessary to transform those actions from innocent conduct to a criminal offense. At the same time, the defendant may claim that if the jury concludes from all of the evidence that he did have the required criminal intent, he did so at the government's instigation.

The well-established fundamental premise of the entrapment defense is "the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense but was induced to commit them by the government." *United States* v. *Russell*, 411 U.S. 423, 435 (1973). The government interprets that language as requiring the defendant to admit all elements of the crime. The government's reliance is without foundation in the law: nothing in this Court' decisions requires a defendant to admit any elements of the offense before he may claim entrapment. On the contrary, this court expressly leaves such matters to the jury. *Sherman* v. *United States*, 356 U.S. 369, 377 (1958). In any given case there exists the very real possibility that the government may have succeeded in creating the circumstantial, objective appearance of intent, without

having actually implanted the criminal design in the defendant's subjective mind. On that premise, a defense of both innocence and entrapment is not only entirely logical and consistent, but best serves the criminal trial's function as a "search for truth." *Nix* v. *Whiteside*, No. 84-1321, slip op. at 8 (Feb. 26, 1986)

In Mr. Mathews' case, it is entirely consistent for him to admit that he received money from Mr. DeShazer, acknowledge that DeShazer was his client at the Small Business Administration, but deny that he took the money with the intent that it would affect Mathews' handling of DeShazer's SBA matters. Intent, for purposes of submission to the jury, was established purely through DeShazer's juxtaposition of discussions about SBA matters with talk about the loan he was offering to Mathews, or even through the physical transfer of money. Mathews denied that he would have ever taken the money if it had been offered in relation to his SBA work. His denial constitutes a denial of the intent element of the offense. Yet he could have argued to the jury that if in fact the jury decided that Mathews had formed the criminal intent essential to a finding of guilt, the jury should consider whether that intent, as well as the physical act, was induced by DeShazer acting as a government agent.

While the government acknowledges, as it must, that a criminal jury trial is a search for the truth, *e.g.*, *United States* v. *Greenfield*, 554 F.2d 179, 182 (5th Cir. 1977), its view would preclude criminal defendants from presenting to the jury a significant portion of the evidence in a given case. "[T]he inconsistency rule subverts the truth-seeking function of the trial by unreasonably requiring a defendant to present to the jury only what *he* believes to be the most credible set of facts available. In large part, the jury is thereby deprived of the benefit of viewing the bases for the accused's indictment in their entirety." Note, *Pleading the Entrapment Defense: The Propriety of Inconsistency*, 28 N.Y.L. Sch. L. Rev. 1025, 1074 (1983) (emphasis in original). Whether a defendant has been

entrapped is a jury question, "as part of its function of determining the guilt or innocence of the accused." *Sherman* v. *United States*, 356 U.S. 369, 377 (1958). Once inducement, the factual predicate for an entrapment claim, is established, "non-entrapment" is simply an additional element which the prosecution must prove. *United States* v. *Demma*, 513 F.2d 981, 983 n.2 (9th Cir. 1975)(citing *Sorrells*, 287 U.S. at 448). The prosecution accomplishes this by proving predisposition. These entrapment issues cannot be removed from the jury's consideration, simply because a defendant contests another element of the government's proof.

The government and a minority of this Court have repeatedly urged the implementation of an objective legal standard for when a criminal defendant may claim the entrapment defense. *United States* v. *Russell*, 411 U.S. 423, 441 (1973) (Stewart, J., dissenting); *Sherman*, 356 U.S. at 384-85 (Frankfurter, J., concurring); *Sorrells*, 287 U.S. at 453, 457 (Roberts, J., concurring). Under that view, the trial judge, not the jury, should decide whether the government's conduct was lawful. *Russell*, 411 U.S. at 441 (Stewart, J., dissenting). This Court has soundly rejected that approach, holding that the entrapment determination is a jury issue. *See Russell*, 411 U.S. at 433-34.

Mathews was improperly denied the opportunity to have the jury consider his entrapment issue, solely because he refused to admit that he was guilty of the offense. The jury should have been allowed to decide whether Mathews committed the substantive elements of the crime and if so, whether the government implanted the criminal design.

As alternative defenses, those two claims are logically consistent. A defendant can consistently claim that, subjectively, the government never succeeded in implanting the criminal intent in his mind. But if the jury finds, from the objective facts before it, that the government successfully implanted the criminal design, the intent certainly would have existed, and the jury is required to move to the issue of whether the govern-

ment's proof was obtained through impermissible "creative activity." *Sorrells*, 287 U.S. at 451.

On the other hand, if the evidence created a circumstantial perception that Mathews had the requisite intent (*i.e.*, he took money from someone who was his client and for whom he was supposed to process various documents), the government may not have successfully transferred the *mens rea* to Mathews.

> To have induced the underlying activity is not necessarily to have induced a particular state of mind, because the activity may reflect any of several different motives. The significant point is that to claim entrapment is to claim that the government induced the acts necessary to constitute the crime charged, whether or not the government also induced the requisite state of mind.

Demma, 523 F.2d at 984 n.2. Nevertheless, the jury logically could find that although Mathews claims an innocent state of mind, the circumstantial evidence of intent was sufficient to persuade the jury that he did have *mens rea*. Given the entrapment defense, the jury also could find that the intent, as well as the physical acts, were the government's creation.

When, as in this case, the testimony and other evidence can arguably support claims of both innocence and entrapment, the jury should be allowed to decide both issues. *See Sherman*, 356 U.S. at 377. Indeed, trial courts *must* instruct the jury on the defendant's defense theory where the record contains *any* evidentiary foundation for the theory, even if the evidence is "weak, insufficient, inconsistent, or of doubtful credibility." *United States* v. *Timberlake*, 559 F.2d 1375, 1379 (5th Cir. 1977).

There is no dispute that "[a] criminal prosecution . . . is not a game." *United States* v. *Rey*, 706 F.2d 145, 147 (5th Cir. 1983). It is irrefutably a serious matter with the potential to permanently affect the course of a defendant's life. A defendant should not be foreclosed from presenting those defenses and allowing the jury to choose. Because there are instances when alternative defenses can be supported by the evidence, if the

jury finds the defenses are factually and logically incompatible, the defendant is the one who takes the risk and bears the brunt of any resulting diminution in credibility. *United States* v. *Kelly*, 748 F.2d 691, 701 n.1 (D.C. Cir. 1984) ("[w]hen [defendant] chose to give testimony at odds with the entrapment defense, he ran the risk of undercutting his own case."); *Demma*, 523 F.2d at 984. "[S]imultaneous denial of criminal intent and advancement of an entrapment theory almost always will damage the likelihood of success of such defense." *United States* v. *Nations*, 764 F.2d 1073, 1081 (5th Cir. 1985).

Permitting the defendant to claim entrapment while he denies guilt is entirely consistent with this Court's view of the entrapment defense. Because Mr. Mathews was denied the opportunity to present both alternative defenses to the jury, his right to a fair trial, with the jury receiving all relevant evidence and instructions, was denied. Reversal is therefore mandated.

II. THE EVIDENCE AT TRIAL DEMONSTRATED SUFFICIENT GOVERNMENT INDUCEMENT TO WARRANT AN ENTRAPMENT INSTRUCTION.

The government erroneously states that two independent reasons supported the lower courts' decisions denying Mr. Mathews the use of the entrapment defense. In fact, the lower courts based their decisions entirely upon the Seventh Circuit Court of Appeals' rule that a defendant who wishes to claim entrapment must first admit that he committed all of the physical acts and had the necessary criminal intent. (J.A. 3-4, 131). *E.g.*, *United States* v. *Rogers*, 755 F.2d 533, 550 (7th Cir. 1985); *United States* v. *Johnston*, 426 F.2d 112, 114 (7th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971). The trial court expressly declined to address the sufficiency of the evidence. (J.A. 131). The government argues extensively that the trial record contains no evidentiary support for the entrapment defense. Although this issue is not squarely before the court, it is easily resolved by reference to the trial record and the law.

Before the entrapment defense can be claimed, the evidence must indicate government inducement to commit the offense. *Russell*, 411 U.S. at 433; *Demma*, 523 F.2d at 984. Inducement requires a showing of more than a government agent's "simple request" to engage in a criminal activity, *Casey* v. *United States*, 276 U.S. 413, 419 (1928), but can be established, as the government acknowledges, by a showing of "persuasion or mild coercion" or by "pleas based on need, sympathy or friendship." *United States* v. *Jackson*, 700 F.2d 181, 191 (5th Cir. 1983).

In *United States* v. *Nations*, 764 F.2d 1073 (5th Cir. 1985), the court held that sufficient evidence of government inducement was presented to allow the defendant to present the entrapment claim to the jury. *Id.* at 1080. The informant, who was the defendant's former brother-in-law and who admitted he had a vendetta against the defendant, *id.* at 1074, "engaged [the defendant's] cooperation with a tale of financial woes, the need to support a new spouse, and terminal cancer, all the while knowing that [the defendant's] sister recently had died of cancer." *Id.* at 1080.

Similar evidence of inducement exists in the instant case. Mathews and DeShazer had been friends for a number of years, confiding in each other about a variety of personal concerns. (J.A. 9, 101, 106, 117-8; R. 38: 434-35). In December 1984 and January 1985 DeShazer was "a desperate man" and blamed Mathews because he was not meeting his defense department contracts. (J.A. 95). DeShazer knew that Mathews was about to lose his job, that Mathews' wife had left him, that Mathews had attorney fees to pay, and that Mathews had significant household expenses. (J.A. 121-22). DeShazer told Mathews a fictitious story about a friend loaning him $12,000.00, that he needed $7,000.00 for mortgage payments, that he did not want his wife to find out about the total amount because it could lead to another divorce, and that therefore he would loan the difference to Mathews. (J.A. 81, 99, 121-22). He played on Mathews' dire financial and employment circumstances, and talked about not wanting another divorce when he knew Mathews'

wife had just left him. And he repeated the offer over a period of two months. (J.A. 23, 35-36, 67-69, 121-25).

Thus, the evidence presented provided a more than adequate "basis for a reasonable doubt on the ultimate jury entrapment issue of whether criminal intent originated with the government." *Nations*, 764 F.2d at 1080. In such cases, where the record contains sufficient evidence to submit the entrapment issue to the jury, "the district court must instruct the jury to acquit unless the evidence proves beyond a reasonable doubt that the defendant was predisposed—that the criminal intent originated with the defendant." *Id.*

Predisposition can be established by a defendant's "ready complaisance" to comply with the government agent's suggestion of criminal activity. *Sherman*, 356 U.S. at 375. The government argued in *Sherman* that the defendant's two prior convictions demonstrated his predisposition. As in *Sherman*, however, there is ample evidence in this case to support the claim that the defendant was not predisposed. Mathews had previously taken money from DeShazer, but according to Mathews, it was always deemed a personal loan with no connection to Mathews' duties at the SBA. There was no indication that *either* party, at the time of the earlier loans, believed that the prior transactions were anything other than personal loans. As for the loan upon which the instant offense is based, the evidence clearly establishes that DeShazer, not Mathews, had to repeatedly initiate conversations about the loan. The evidence further showed that on February 28, 1985, when DeShazer suggested the subject loan, Mathews had not requested any loans since July, 1984. At the very least, Mathews' own testimony raised the issue of inducement and lack or predisposition. The jury should have been permitted to consider this in the light of the law of entrapment.

If lack of predisposition is an essential factor to be established before a defendant may claim entrapment, then the concommitant premise is that the government must prove beyond a reasonable doubt that the defendant was predisposed to commit the offense. *See Hampton* v. *United States*, 425 U.S.

484, 489 (1976); *Nations*, 764 F.2d at 1080; *United States* v. *Rhodes*, 713 F.2d 463, 467 (9th Cir.), *cert. denied*, 466 U.S. 1012 (1983). If entrapment is established, there is no crime. *Sorrells*, 287 U.S. at 452. Therefore, when inducement is raised by trial evidence, non-entrapment is an element of every crime.

It is not for this Court, however—or indeed for any entity but the jury—to decide whether the evidence established that Mathews was or was not predisposed to commit the offense. As discussed earlier, the issue of guilt and the issue of entrapment are both issues for the jury.

In this case, despite a more than adequate evidentiary foundation, the jury was never allowed to decide the entrapment issue because Mathews refused to admit that he was guilty. The issue presented for review is whether a defendant should be allowed to claim entrapment when he denies possessing the requisite criminal intent. Resolution of that issue renders unnecessary the Court's analysis of whether the record below included enough evidence to permit the defendant to claim entrapment.

CONCLUSION

As stated in his original brief, Frederick Mathews respectfully urges this Court to reverse his conviction and grant him a new trial with the ability to claim the entrapment defense without forfeiting his constitutional rights to remain silent, to refrain from incriminating himself, and to require the government to prove every element of the offense charged beyond a reasonable doubt. In so doing, this Court will eliminate a longstanding dichotomy in the circuits while reiterating and clarifying its well-established holdings on the entrapment defense.

Respectfully submitted,

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